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SUPREME COURT, U.S.

No. 80-6434

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOSEPH GREEN BROWN, et al.,

Petitioners,

-v.-

LOUIE L. WAINWRIGHT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

By statute, the Supreme Court of Florida automatically reviews judgments of death, and makes an independent examination of the record to determine whether the death sentence is warranted by the aggravating and mitigating circumstances of each case, measured against those in other capital cases. During the period of the past five years or more, that court has followed a practice, unauthorized and unannounced by statute or rule, of requesting and receiving ex parte information concerning appellants in pending capital appeals, without notice to these appellants or their attorneys. This information, all dehors the record, has included post-judgment psychiatric evaluations and psychological screening reports, presentence reports unrelated to the capital offense, and reports prepared by prison personnel.

The decision below sustaining this practice raises the question whether the practice denies death-sentenced appellants due process of law, the effective assistance of counsel, or the right of confrontation, or subjects them to cruel and unusual punishment or to compulsory self-incrimination, in violation of the Fourteenth Amendment and its incorporated guarantees.*/

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*/ The petitioners and their respective counsel are listed in Appendix A.

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PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF FLORIDA

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Florida.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida, Brown, et al. v. Wainwright, 392 So.2d 1327 (Fla. 1981), is set out in Appendix B infra.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on January 15, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), petitioners having asserted below and asserting here deprivations of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the statutes of Florida:

§ 921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on issue of penalty. -- Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury. -- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death. -- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) Review of judgment and sentence. -- The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances. -- Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft

piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) Mitigating circumstances. -- Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

STATEMENT OF THE CASE

Since at least as early as 1975, the Supreme Court of Florida has pursued the practice of requesting and receiving ex parte materials from state executive officials, relating to

death-sentenced appellants in pending appeals, without the knowledge of the appellants or their counsel. The existence of this practice was not disputed below and appears in its major outlines to be indisputable, although, by its secret nature, its full extent is not known.

When the practice came to light, the present proceeding was instituted, asserting numerous violations of petitioners' federal constitutional rights. Since the proceeding complained of conduct by the Supreme Court of Florida, it was filed directly in that court, as an Application for Extraordinary Relief and Petition for Writ of Habeas Corpus. The petition and its appendices are set out in Appendix C. Citing considerations of "judicial economy because of the common issues of law and fact presented" (App. C, p. 2c), 124 petitioners under sentences of death joined in the petition.

Petitioners alleged that the Supreme Court of Florida

> has engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal. The information includes but is not limited to: presentence investigation reports concerning the capital offense under review or prior convictions unrelated to the capital offense; psychiatric evaluations or contact notes; psychological screening reports; recitations of a capital defendant's refusal to submit to a psychiatric examination from which a report could be prepared; post-sentence investigation reports; probation or parole violation reports; and state prison classification and admissions summaries . . . .
>
> Except as to some of the presentence investigations pertaining to the offense on appeal the above information was requested and received without notice to the capital appellants or their attorneys.

(App. C, pp. 2c-3c.) An appendix to the petition documented the practice with copies of correspondence from the Office of the Clerk of the Supreme Court of Florida to officials of the

Department of Corrections requesting "the latest psychiatric evaluation" of named capital appellants (App. C, pp. 81c, 86c, 93c, 95c, 101c, 104c, 106c, 108c, 110c, 115c, 118c); responsive correspondence from Department of Corrections officials to the Clerk, transmitting the requested information (App. C, pp. 58c, 64c, 82c, 93c, 96c, 98c, 102c, 105c, 107c, 109c, 111c, 114c, 117c, 119c); and notations of telephonic requests by the Clerk for similar information (App. C, pp. 33c, 40c, 50c, 51c, 55c, 64c, 65c, 70c, 129c). This documentation was stated to be "merely exemplary" (App. C, p. 3c), because, in addition to the secrecy of communications to and from the court, petitioners alleged that "a quantity of the information received by the Court, and of records reflecting the practice of requesting and receiving it . . . has at the Court's direction been destroyed or purged from [the] . . . Court's files." (Id.)

By a motion accompanying the petition, petitioners requested that, if any of their allegations were materially controverted, a special master should be appointed and other procedures instituted for resolving the resulting issues of fact (App. C, pp. 169c-183c). Petitioners' allegations were, however, not controverted. The court issued an order to show cause (App. C, p. 184c), and the respondent replied by filing a motion to dismiss (App. C, pp. 185c-193c) which neither disputed the facts alleged in the petition nor alleged any contrary facts.

After hearing oral argument,[1] the Supreme Court of Florida

1/ The transcript of the oral argument before the Supreme Court of Florida is contained in Appendix C, pp. 194c-257c.

denied the petition on the merits.[2/] It held that:

> Even if petitioners' most serious charges were accepted as true, as a matter of law our view of the non-record information petitioners have identified is totally irrelevant either to our appellate function in capital cases as it bears on the operation of the statute, or to the validity of any individual death sentence.

(App. B, p. 5b.) Drawing a distinction between sentence "'review'" and sentence "'imposition'" (id.;see also id. at 7b), the court concluded that "[s]ince we do not 'impose' sentences in capital cases, Gardner[3/] presents no impediment to the advertent or inadvertent receipt of some non-record information." (Id. at 6b.) "[N]on-record information we may have seen, even though never presented to or considered by the judge, the jury, or counsel, plays no role in capital sentence 'review.'" (Id. at 7b.) Accordingly:

> As we view the case, . . . appellate review can never be compromised, in the constitutional sense required by Proffitt, [4/] by the receipt of any quantity of non-record information.

(Id. at 7b n.16.) "The upshot . . . is that petitioners' claims

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2/ The court criticized the procedure of joining multiple habeas corpus petitioners in a single petition, and said that "[i]n the future, attempts to create a class action habeas corpus proceeding in situations such as this will be rejected summarily." (App. B, p. 4b.) However, in the present case, "[t]o avoid absurd technicalities," the court "decline[d] to treat each petition as if it were separately filed and enter a separate order or opinion on each. Rather, our disposition of Brown's petition effectively disposes of all claims for relief of those petitioners who have joined with Brown." (Id.) So the court's order was that "[t]he petitions of Brown and the others for writs of habeas corpus and for other extraordinary relief are denied." (Id. at 7b.)

3/ Gardner v. Florida, 430 U.S. 349 (1977).

4/ Proffitt v. Florida, 428 U.S. 242 (1976).

are untenable." (Id. at 7b.) All relief was denied to each and every petitioner, and the court ordered that "[n]o petitions for rehearing will be entertained." (Id. at 8b.)

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The petition asserted that the Supreme Court of Florida's practice of secretly requesting and receiving extra-record materials on pending capital appeals violated petitioners' rights "under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States" (App. C, p. 3c), "the right to counsel as guaranteed by the Sixth and Fourteenth Amendments" (id.), "the Eighth Amendment" (id.), "the privilege against self-incrimination as guaranteed by the Fifth Amendment" (id.), and "the right to confrontation as guaranteed by the Sixth Amendment" (id. at p. 4c). Each of these contentions was extensively briefed. (Id. at pp. 4c- 13c.) The Supreme Court of Florida held that as a matter of law, "the doctrines of constitutional law here argued are singularly unpersuasive" (App. B., p. 5b) and denied the petition on its face (id. at 7b-8b).

REASONS FOR GRANTING THE WRIT

This case raises the question of the process that is due in capital appeals under the sort of death-sentencing statute which this Court approved on its face in Gregg v. Georgia, 428 U.S. 153 (1976), and Proffitt v. Florida, 428 U.S. 242 (1976). The issue could not be more squarely drawn.

For a number of years, the Supreme Court of Florida has engaged in a pervasive practice of acquiring extra-record information concerning death-sentenced appellants, in connection with their pending appeals. It has done so secretly, without notice to the appellants or their lawyers, and without

the sanction of any statutory authority or duly promulgated rule of procedure which might have notified the appellants or their lawyers even of the existence of the practice.

Petitioners alleged these facts below, and documented them with copies of numerous ex parte communications to and from the court. Respondent did not dispute petitioners' allegations or question their documentation; and the Supreme Court of Florida accepted them as true for the purposes of the decision which is now presented for review. Not only did it uphold its practice for the past and for the future, but it held unequivocally that capital "appellate review can never be compromised . . . by the receipt of any quantity of non-record information." (App. B., p. 7b n.16.)

Certiorari should be granted to determine whether this ruling, and the practice which it sustains, is consistent with the federal constitutional requirements governing capital appeals. Simply to describe the practice is to demonstrate the gravity of that question. The decision below immediately affects the State with the largest death-row population in the Nation. It implicates, and manifestly departs from, broad and fundamental doctrines of constitutional law established by this Court:

1. Even in proceedings where much less is at stake than life and death, due process forbids the ex parte consideration of evidentiary materials. Rate-making may not be done on the basis of "evidential facts not spread upon the record," Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 300 (1937), so that the facts considered against a party are "unknown" and "there is no way to find them out,"

id. at 300, 302. "This will never do if hearings and appeals are to be more than empty forms." Id. at 303 (emphasis added). See also Morgan v. United States, 304 U.S. 1, 18 (1938).

The issue presented here is not whether an appellate court may ever consider extra-record information of a factual nature[5/] relating to a pending appeal. Augmentation of the record, under appropriate procedures and with notice to the parties, is not what is involved in this case. The issue is the constitutionality of an appellate court's requesting and receiving such evaluative materials as psychiatric and psychological reports -- materials which particularly require testing by the adversary process, Vitek v. Jones, 445 U.S. 480, 495 (1980); see also Addington v. Texas, 441 U.S. 418, 430 (1979) -- without notice to the parties, and through ex parte communications between the court and state executive agencies.[6/]

It is difficult to imagine that this Court would sanction such a procedure as consistent with due process in any appeal

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5/ No such information was involved in Ex parte Farley, 570 S.W.2d 617 (Ky. 1978), erroneously relied upon by the Supreme Court of Florida below. (App. B., p. 6b.) Indeed, the Court of Appeals of Kentucky explicitly distinguished the general compilation of materials in question there from "individualized information pertaining to the defendant personally . . . ." Ex parte Farley, supra at 626.

6/ Canon 3A(4) of the ABA Code of Judicial Conduct, prohibiting judges from initiating or considering ex parte communications concerning a pending proceeding, is in force in Florida. Florida Bar Code of Judicial Conduct, Canon 3A(4). It makes no distinction between trial and appellate judges.

where questions of fact and law are inextricably bound together, say, for example, an appellate court's ex parte solicitation and receipt of an extra-record land valuation report in a condemnation-award appeal. Due process has always been supposed to require that such materials be disclosed so that "the party against whom they are offered may see the evidence or hear it and parry its effect." Ohio Bell Telephone Co. v. Public Utilities Commission, supra, 301 U.S. at 302. See, e.g., Willner v. Committee on Character and Fitness, 373 U.S. 96, 103 - 106 (1963). This traditional requirement cannot have less force where life is at stake.

2. If there were any doubt about that proposition, it was laid to rest by Gardner v. Florida, 430 U.S. 349 (1977). The practice forbidden by Gardner -- trial-court consideration of undisclosed, "confidential" portions of presentence reports in capital sentencing -- was far less fraught with unfairness and unreliability than the practice revealed in the present record. Here, as there, the "risk that some of the information accepted in [secrecy] . . . may be erroneous, or may be misinterpreted [in the absence of adversary testing] . . . is manifest." Id. at 359. Here, in addition, the information was received pursuant to no regular, uniform, or legally authorized procedure; and petitioners, unlike Gardner, were never even made aware that any undisclosed materials were before the court that sat to decide their fate. They had no warning or reason to believe that surreptitiously obtained information might be involved in the adjudication of their capital appeals by the Supreme Court of Florida, and no way to ascertain, let alone to protect themselves against, the prejudicing of their cases by this invisible information.

The Supreme Court of Florida's holding that Gardner is inapplicable to its appellate function in death cases

because of the distinction between "imposition" and "review" of death sentences (App. B, pp. 5b-7b) is altogether untenable. That distinction is said to rest upon the logic that, since "[n]either of our sentence review functions . . . involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances" (App. B., p. 5b), "non-record information we may have seen, even though never presented to or considered by the judge, the jury, or counsel, plays no role in capital sentence 'review'" (id. at 6b-7b), with the consequence that "our view of the non-record information petitioners have identified is totally irrelevant . . . to our appellate function in capital cases" (id. at 5b). The notable mystery in the analysis is, of course, why, if the non-record information "is totally irrelevant," the Supreme Court of Florida has so painstakingly and pervasively solicited it.[7/] In any event, the court's logic is wide of the mark. For to say that non-record information has

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7/ The opinion below nowhere states why the court sought psychiatric and psychological reports and other similar materials dehors the record from the Department of Corrections. It does contain a footnote saying:

> We cannot help but observe that the operation of capital punishment laws has been dependent upon a changing set of procedural principles, see Lockett v. Ohio, 438 U.S. 586 (1978); Gardner v. Florida, 430 U.S. 349 (1977), which have imposed shifting, supervisory standards on state high courts. The "tainted" information we are charged with receiving was, as counsel concedes, in every instance obtained to deal with newly-articulated procedural standards. It would be ironic indeed if petitioners were successful in their assertion that the statute operates unconstitutionally because this Court has acted promptly from time to time to respond to new directives from the Supreme Court as to what procedures are required to make the statute operate in a constitutional manner.

(App. B., p. 7b n.17.)

Two observations are in order:

First, petitioners made no such concession as this footnote

no proper place in the Supreme Court of Florida's appellate review function is not to say that such information cannot affect the court's performance of its function. Manifestly, it can.

The court itself has heretofore described Florida's capital sentencing procedure as a "trifurcated" one, e.g., Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); Dobbert v. State, 375 So.2d 1069, 1071 (Fla. 1979), in which the Supreme Court of Florida has the responsibility to examine the death sentence in each and every case -- to "review that case in light of other decisions and determine whether or not the punishment is too great," State v. Dixon, 283 So.2d 1, 10 (Fla. 1973) (quoted in Proffitt v. Florida, supra, 428 U.S. at 251). It has heretofore described that responsibility as "a separate responsibility to determine independently whether the imposition of the ultimate penalty is warranted." Songer v. State, 322 So.2d 481, 484 (Fla. 1975), vacated on other grounds, 430 U.S. 952 (1977) (quoted in part in Proffitt v. Florida, supra, 428 U.S. at 253). In performing this responsibility, it "weigh[s] both the aggravating and the mitigating circumstances as shown in the record," Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975), and "review[s] the sentence in the light of the facts presented in the evidence, as well as other decisions, and determine[s] whether or not the punishment is too great," Alvord v. State, 322 So.2d 533, 540 (Fla. 1975). Accord: Adams v.

7/ (Continued)

ascribes to them. A transcript of the oral argument is available for this Court's examination, and contains nothing of the sort. (App. C, pp. 194c-257c.) What it does contain -- and perhaps the subject of the footnote's reference -- is an expression of the presumption that the Supreme Court of Florida was aiming throughout to perform justly its onerous duty to review death sentences.

Second, the footnote does not state how the solicitation of extra-record psychiatric and psychological assessments, etc., from the Department of Corrections assisted the Supreme Court of Florida to comply with Gardner, Lockett, or any other "new directives." Still less does it explain how such materials could be used for such purposes while remaining "totally irrelevant" to the Supreme Court of Florida's appellate function in capital cases. (App. B., p. 5b.)

State, 341 So.2d 765, 769 (Fla. 1977); McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977); Vasil v. State, 374 So.2d 465, 471 (Fla. 1979); Malloy v. State, 382 So.2d 1190, 1193 (Fla. 1979). In short, it undertakes to make a discerning appraisal of the facts about the particular defendant and the crime, both for the purpose of assuring that a death sentence in the individual case is warranted, and for the purpose of comparing that case with others to assure "that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case," State v. Dixon, supra, 283 So. 2d at 10 (quoted in Proffitt v. Florida, supra, 428 U.S. at 251). To conceive that in a judgmental process of this sort the intrusion of extra-record psychiatric and psychological assessments of the appellants and similar materials, especially solicited by the court from the Department of Corrections in connection with the appeal, "play no part in our sentence review role" (App. B., p. 6b), is to misconceive reality. Constitutional rules designed to assure "that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, supra, 430 U.S. at 358, must be made to stand on stronger stuff than illusion.

3. The decision below plainly wars with the assumptions upon which this Court decided Proffitt v. Florida, supra. Relying upon Supreme Court of Florida opinions including those we have cited, the prevailing Proffitt opinion said:

> [The risk] that the death penalty will . . . be imposed in an arbitrary or capricious manner . . . is minimized by Florida's appellate review system, under which the evidence of aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine whether the imposition of the ultimate penalty is warranted." Songer v. State, 322 So.2d 481, 484 (1975).

Proffitt v. Florida, supra, 428 U.S, at 253, Far from minimizing the risk of arbitrary and capricious infliction of the death penalty, the practice of the Supreme Court of Florida revealed by this record enhances it. "Without full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia." Gardner v. Florida, supra, 430 U.S. at 361. That is no less true of covert, ex parte fact-gathering on appeal than at trial.

4. The receipt of ex parte evidence on appeal deprives death-sentenced appellants of the effective assistance of counsel. It labors the obvious to say that the written and oral presentations of trained advocates are necessary on appeal, as well as at trial, to argue about, explain, qualify, and set in context the facts no less than (often more than) the law. See, e.g., Anders v. California, 386 U.S, 738 (1967). The decison below asserts that the Justices of the Supreme Court of Florida

> can be trusted to exercise their discretion in a responsible manner, even though they may base their decisions on secret information . . . . [That assertion] rests upon the erroneous premise that the participation of counsel is superfluous to the process of evaluating the relevence and significance of aggravating and mitigating facts. Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases.

Gardner v. Florida, supra, 430 U.S. at 360. The "opportunity to comment on facts" solicited dehors the record by an appellate court is no less important; and, where the "facts" consist of psychiatric evaluations solicited from the Department of Corrections, it is overwhelmingly important.

5. The practice of requesting and receiving such evaluations in secret trenches upon other constitutional guarantees as well. These are noted summarily, in order to avoid needless prolongation of this petition. Since neither these death-sentenced petitioners nor their attorneys were informed that post-judgment interviews by correctional employees and mental health professionals would be used to provide information forwarded to the Supreme Court of Florida for inclusion in its sentencing review, petitioners' rights against self-incrimination and to counsel were overreached. Since counsel were kept unaware of the court's receipt of the information, petitioners' rights of confrontation were denied. Since the secret and irregular acquisition of such extra-record information by the court not only failed to assure, but undermined, reliable and even-handed administration of the punishment of death, petitioners' rights against cruel and unusual punishment were compromised.

Petitioners appreciate the presumption against constitutional broadsides. Nevertheless, it should not be surprising that the practice sanctioned by the Supreme Court of Florida in this case infringes more than one or two of the Bill of Rights guarantees that are components of due process. Those guarantees all assume, and depend in major part for their protection upon, an orderly and regular course of judicial proceedings in which evidence is received and tested by the traditional adversary methods of the Anglo-American system of criminal justice. That system has never contemplated that judges would secretly solicit ex parte information from state

correctional officials, without notice or even a hint of warning to the parties, in matters of life and death.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

APPENDIX A

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APPENDIX B

Joseph Green BROWN et al., Petitioners,

v.

Louie L. WAINWRIGHT, Respondent.

No. 59732.

Supreme Court of Florida.

Jan. 15, 1981.

Defendant joined with other convicted murderers in petitioning for writ of habeas corpus to obtain relief from allegedly unconstitutional sentences of death. The Supreme Court held that: (1) joinder of habeas corpus petitions of convicted murderers previously sentenced to death was allowed to avoid absurd technicalities, even though petitioners' cases were in different stages of appellate process, and (2) consideration by Supreme Court of information concerning capital appellants, which was not presented at trial and not part of trial record or record on appeal, was not unconstitutional since Supreme Court's role was merely to review and not to impose death sentence.

Petitions denied.

Boyd, J., concurred in result with opinion.

1. Habeas Corpus ⇐52

A joinder of habeas corpus petitions, being unique, requires close scrutiny and a compelling justification.

2. Criminal Law ⇐622(1)

Multiple party joinder is a function of the facts and circumstances of each case, with the determination in each necessarily resting within the sound discretion of the court.

3. Habeas Corpus ⇐52

Joinder of habeas corpus petitions of 123 convicted murderers who had been sentenced to death would be allowed to avoid absurd technicalities, even though some of petitioners' cases were still in different stages of appellate process.

4. Criminal Law ⇐1134(1)

Supreme Court's role after death sentence has been imposed is to review lower court's decision and consists of two discrete functions: to determine if jury and judge acted with procedural rectitude in applying death sentence statute; and to ensure relative proportionality among death sentences which have been approved statewide. West's F.S.A. § 921.141.

5. Criminal Law ⇐1158(1)

If the findings of aggravating and mitigating circumstances by trial court are supported by sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the death penalty statute, the trial court's sentence must be sustained even though, had Supreme Court been triers and weighers of fact, it might have reached a different result in an independent evaluation. West's F.S.A. § 921.141.

6. Criminal Law ⇐1134(2)

Consideration by Supreme Court of information concerning convicted murderers, which was not presented at trial and was not part of trial record or record on appeal, including presentence investigations, psychiatric evaluations or contact notes made in the corrections system after conviction, and psychological screening reports made after conviction by corrections personnel, during appeals from convictions imposing death sentence was not unconstitutional since Supreme Court's role was merely to review and not to impose death sentence. U.S.C.A.Const. Amends. 5, 14; West's F.S.A. § 921.141.

Samuel S. Jacobson and Albert J. Datz of Datz, Jacobson & Lembcke, Jacksonville, Marvin E. Frankel, New York City, Richard L. Jorandby, Public Defender and Craig S. Barnard, Chief Asst. Public Defender, West Palm Beach, for petitioners.

Jim Smith, Atty. Gen., and George R. Georgieff, Carolyn M. Snurkowski and Raymond L. Marky, Asst. Attys. Gen., Tallahassee, for respondent.

PER CURIAM.

Joseph Green Brown petitions the Court for a writ of habeas corpus to obtain relief from an allegedly unconstitutional sentence of death. Brown was convicted of first-degree murder and sentenced to death, following which his conviction and sentence were affirmed by this Court. *Brown v. State*, 381 So.2d 690 (Fla. 1980). An application for certiorari is now pending in the United States Supreme Court. *Brown v. Florida*, No. 80-5708 (U.S. Nov. 17, 1980).

Alleging common issues of law and fact, Brown has joined with one hundred and twenty-two other persons who seek relief from allegedly unconstitutional sentences of death. The dominant theme in the multiple requests for relief is the alleged impropriety of this Court's having considered, in the course of reviewing sentences of death, documents which were not made available to the defendants' counsel. For most of the petitioners, the alleged impropriety was the Court's consideration of undisclosed documents not related to the proceedings in which their sentences were imposed or upheld, but seen in the course of reviewing

death sentences approved or considered for *other* criminal defendants.

Before reaching the merits of the petitions, we first consider the procedural basis on which the Court has been asked to entertain habeas corpus petitions on a consolidated basis.

I

[1] The writ of habeas corpus—the common law remedy used primarily to deliver from imprisonment those who are illegally confined [1]—has long been recognized as an essential vehicle by which fundamental individual liberties are shielded from illegal governmental action.[2] Traditionally, habeas corpus has been characterized by its utility in cutting through the "procedural morass" of institutional red tape so as to secure the release of persons unlawfully detained.[3] It has been recognized, however, that no prisoner has an interest in the illegal restraint of another, since a sentence of imprisonment operates on each individually.[4] A joinder of habeas corpus petitions, therefore, being unique, requires close scrutiny and a compelling justification.

The joinder of criminal defendants in trial proceedings is commonplace. The reasons which support joinder in those situations—considerations of judicial economy flowing from the presentation of common issues of law and fact, weighed against the potential prejudice to the defendants sought to be joined [5]—provide a useful perspective from which to examine the desirability of deciding jointly the claims presented here.

In multiple habeas corpus petitions, such as those before us, prejudice to the petitioners is obviously of no concern. For one thing, these proceedings do not involve adjudications of guilt, but only the legality of petitioners' confinement as related to this Court's sentence review.[6] For another, petitioners themselves, rather than the prosecuting authority, have sought consolidated consideration.

[2] Considerations of judicial economy, then, are alone relevant here. As to these, economies become attenuated, and the potential benefits less attractive, as the disparity between legal and factual issues increases.[7] Multiple party joinder is a function of the facts and circumstances of each case, with the determination in each necessarily resting within the sound discretion of the court.[8] In the final analysis, a balancing test is employed to take into account the relative advantages and disadvantages attendant to joint consideration of the common and any noncommon claims presented.

Brown and the other petitioners in this proceeding—the one hundred and twenty-three inmates on "death row"—premise their joint filing for habeas corpus relief on alleged judicial economies which will flow from our considering in one proceeding allegedly common issues of law and fact. Those economies are not readily apparent in considering the several petitions, as the facts relevant to each vary significantly. Petitioners' appendices, and their request for a special master to develop facts further, bear this out. Petitioners' cases are even in different stages of the appellate

1. *Porter v. Porter*, 60 Fla. 407, 53 So. 546 (1910).

2. For a short overview of the history of the writ of habeas corpus, *see State ex rel. Deeb v. Fabisinski*, 111 Fla. 454, 152 So. 207 (1933).

3. *Price v. Johnston*, 334 U.S. 266, 269, 68 S.Ct. 1049, 1052, 92 L.Ed. 1356 (1948).

4. *See State ex rel. Williams v. Purdy*, 242 So.2d 498 (3d DCA), *appeal dismissed*, 248 So.2d 171 (Fla. 1971), *citing In re Kosopud*, 272 F. 330 (N.D. Ohio 1920) and *Riley v. City and County of Denver*, 137 Colo. 312, 324 P.2d 790 (1958).

5. *See Abbott v. State*, 334 So.2d 642 (3d DCA 1976), *cert. denied*, 345 So.2d 420 (Fla. 1977), and *cert. denied*, 431 U.S. 968, 97 S.Ct. 2926, 53 L.Ed.2d 1064 (1977); *Tifford v. State*, 334 So.2d 91 (Fla.3d DCA 1976), *cert. denied*, 344 So.2d 327 (1977).

6. *See* Note, *Multiparty Federal Habeas Corpus*, 81 Harv.L.Rev. 1482, 1483 (1968).

7. *See id.* at 1488.

8. *See Menendez v. State*, 368 So.2d 1278 (Fla. 1979); *Stripling v. State*, 349 So.2d 187 (Fla.3d DCA 1977), *cert. denied*, 359 So.2d 1220 (1978).

process. Joined together are persons whose appeals from sentences of death are pending in this Court and persons whose sentences have already been affirmed by this Court—some more than once. The first category of petitioners have filed requests which are obviously premature.

The economies petitioners assert only become manifest if we rule precisely in the manner petitioners have urged—a presumptuous view of the merits of the cause. The fact of the matter is that to consider Brown's claim along with each of the others would plainly prove more unwieldly than economical.[9] Unlike *In re Baker*, 267 So.2d 331 (Fla. 1972),[10] this case does not involve the routine application of a previously adjudicated constitutional issue to numerous persons who are, in reality, similarly situated. The claims for relief in these petitions present for our analysis new and unresolved constitutional issues, some applicable to one group of petitioners and some applicable to others.[11]

The joinder here is manifestly designed, at best, to curtail all executions in Florida on legal grounds not yet adjudicated or, at least, to suspend the imposition of any lawful sentence until new legal issues are resolved. The latter objective, of course, has already been achieved. To allow a joinder under these circumstances in future cases would distort habeas corpus beyond recognition and create a pernicious precedent in capital cases. We decline to approve this precedent. There is no justification for joinder in situations such as this.

[3] To avoid absurd technicalities, however, we decline to treat each petition as if it were separately filed and enter a separate order or opinion on each. Rather, our disposition of Brown's petition effectively disposes of all claims for relief of those petitioners who have joined with Brown. In the future, attempts to create a class action habeas corpus proceeding in situations such as this will be rejected summarily.

II

Turning to the legal issues presented, we perceive that petitioners' several constitutional claims all emanate from their assertion that we have "engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal." This information allegedly includes pre-sentence investigations, psychiatric evaluations or contact notes made in the corrections system after conviction, and psychological screening reports made after conviction by corrections personnel.[12] The receipt of this information, petitioners assert generally, has led to a rash of constitutional violations ranging from a denial of due process in individual cases where information was received, on the one hand, to a pervasive violation of *Gardner v. Florida*, 430 U.S. 346 (1972), imposed life sentences on the class of persons previously sentenced to death who had not been resentenced as of that date.

9. *State ex rel. Williams v. Purdy*, 242 So.2d 498 (3d DCA), *appeal dismissed*, 248 So.2d 171 (Fla. 1971) (class action not an appropriate remedy in habeas corpus proceeding). We note that the applicability to habeas corpus of the rules concerning joinder and class actions has engendered much controversy in the federal courts. *Harris v. Nelson*, 394 U.S. 286, 294 n.5, 89 S.Ct. 1082, 1088 n.5, 22 L.Ed.2d 281 (1969); *United States ex rel. Sero v. Preiser*, 506 F.2d 1115 (2d Cir. 1974), *cert. denied*, 421 U.S. 921, 95 S.Ct. 1587, 43 L.Ed.2d 789 (1975); *Adderly v. Wainwright*, 58 F.R.D. 389, 400 (M.D.Fla. 1972). *See generally* Note, *Multiparty Federal Habeas Corpus*, 81 Harv.L.Rev. 1482 (1968).

10. In *Baker*, this Court, pursuant to the United States Supreme Court's mandate in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d

11. The disparities are highlighted by the state's motion to dismiss those of the petitions which allege no direct "taint" in our review of prisoners' sentences.

12. Petitioners also assert that we have seen and were prejudicially affected (1) by one reference in a letter to the Court that one convict refused to submit to a psychiatric report, (2) by the mention in letters to the Court that there exist probation and parole violation reports for two convicts, and (3) by the mention in another letter to the Court that there exists a prison classification and admission summary for one convict.

349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), in all capital cases reviewed and affirmed by the Court, on the other hand. In short, petitioners contend that our alleged misconduct requires our invalidation of all death sentences imposed or approved in Florida, and by necessary implication, that we declare Florida's death penalty statute invalid and unconstitutional in its operation.

Despite strident characterizations of our receipt of these materials,[13] and notwithstanding the vigor and pith of the hypotheses on which petitioners depend, the doctrines of constitutional law here argued are singularly unpersuasive. Even if petitioners' most serious charges were accepted as true, as a matter of law our view of the non-record information petitioners have identified is totally irrelevant either to our appellate function in capital cases as it bears on the operation of the statute, or to the validity of any individual death sentence.

Florida's death penalty statute, section 921.141, Florida Statutes (1979), directs that a jury and judge, not this Court, must weigh the evidence of aggravating and mitigating circumstances delineated in the statute to determine whether death is an appropriate sentence. The jury performs that function only to recommend a sentence to the trial judge. It then becomes the responsibility of the trial judge to weigh evidence of aggravating and mitigating circumstances in order to arrive at a reasoned judgment as to the appropriate sentence to impose.[14]

[4] This Court's role after a death sentence has been imposed is "review," a process qualitatively different from sentence "imposition." It consists of two discrete functions. First, we determine if the jury and judge acted with procedural rectitude in applying section 921.141 and our case law. This type of review is illustrated in *Elledge v. State*, 346 So.2d 998 (Fla. 1977), where we remanded for resentencing because the procedure was flawed—in that case a nonstatutory aggravating circumstance was considered. *See also Brown v. State*, 381 So.2d 690 (Fla. 1980); *Kampff v. State*, 371 So.2d 1007 (Fla. 1979).

The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and jury have acted with procedural regularity, we compare the case under review with all past capital cases to determine whether or not the punishment is too great. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *State v. Dixon*, 283 So.2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). In those cases where we found death to be comparatively inappropriate, we have reduced the sentence to life imprisonment. *See Malloy v. State*, 382 So.2d 1190 (Fla. 1979); *Burch v. State*, 343 So.2d 831 (Fla. 1977); *Jones v. State*, 332 So.2d 615 (Fla. 1976).

[5, 6] Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not unreasonably rejected,[15] and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.

It is not the function of this court to cull through what has been listed as aggra-

13. At oral argument, counsel for petitioners charitably described our receipt of these materials as "an understandable effort to be fully informed."

14. The relationship of the judge's responsibility to the jury's, about which much has been said in our opinions, is not germane here.

15. *Tedder v. State*, 322 So.2d 908 (Fla. 1975).

> vating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not, and then impose the proper sentence. In accordance with the statute, the culling process must be done by the trial court.

Mikenas v. State, 367 So.2d 606, 610 (Fla. 1978). *Accord, Hargrave v. State*, 366 So.2d 1 (Fla. 1978), *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979).

The record of each proceeding, and precedent, necessarily frame our determinations in sentence review. Our opinions, of course, then expound our analysis. Factors or information outside the record play no part in our sentence review role. Indeed, our role is neither more nor less, but precisely the same as that employed by the United States Supreme Court in its review of capital punishment cases. Illustrative of the Court's exercise of the review function is *Godfrey v. Georgia*, — U.S. —, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

Petitioners' contentions in this proceeding are essentially grounded on *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). *Gardner* stands for the proposition that a sentence of death may not be imposed (note the word "imposed") to any extent on non-record, unchallengeable information. *Id.* at 362, 97 S.Ct. at 1206. Since we do not "impose" sentences in capital cases, *Gardner* presents no impediment to the advertent or inadvertent receipt of some non-record information. The Kentucky Supreme Court explained the distinction which has eluded petitioners in *Ex Parte Farley*, 570 S.W.2d 617 (Ky. 1978), responding to the very assertion that is made here concerning the review of "non-record" materials in capital cases:

> Every opinion from a case book, every text or treatise, every law review article, every philosophical, historical or religious document a judge might see fit to read and consider, including the Holy Bible, is a tangible source of information from which he may pick and choose in arriving at a judgment.
>
> . . . . . .
>
> There are obviously differences between individualized information pertaining to the defendant personally, which is to be considered by a trial judge in fixing a sentence, and the impersonal data that may be used by an appellate court in determining whether the judgment of a trial court is or is not in line with what has been done in comparable cases.
>
> . . . . . .
>
> It seems to us that the difference is quite fundamental. If a judge or jury deciding one's fate is going to consider reports of what other people say about him, certainly he should be entitled to see them. "The risk that some of the information accepted in confidence may be erroneous, or may be misinterpreted, by the investigator or by the sentencing judge, is manifest." *Gardner v. Florida, supra*, at 430 U.S. 359, 97 S.Ct. 1205. But we are not the sentencing court. In any given case before us we intend to comply with the statutory request to include in our decision a reference to those similar cases that have been taken into consideration. Presumably, however, the petitioners want to know not only what will be taken into consideration, but what will not, and to know it in advance, so that they can urge upon us what to choose and what to avoid.
>
> . . . . . .
>
> We do not find it possible to believe that in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the Supreme Court of the United States meant to lay down a principle so pervasive as to require an appellate court to lay out for inspection by the appellant, even in a capital case, all of the information in its hands from which it may seek perspective and guidance in reviewing the propriety of his sentence. We therefore hold that *Gardner* does not apply. *Id.* at 625-27 (footnote omitted).

It is evident, once our dual roles in the capital punishment scheme are fully appreciated, that non-record information we may have seen, even though never presented to

or considered by the judge, the jury, or counsel, plays no role in capital sentence "review." That fact is obviously appreciated by the United States Supreme Court, for it very carefully differentiated the sentence "review" process of appellate courts from the sentence "imposition" function of trial judges in *Proffitt* and in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

A remaining question is whether the reading of non-record documents would so affect members of this Court that they could not properly perform their assigned appellate functions. Plainly, it would not. Just as trial judges are aware of matters they do not consider in sentencing, *Alford v. State*, 355 So.2d 108 (Fla.), *cert. denied*, 436 U.S. 935, 98 S.Ct. 2835, 56 L.Ed.2d 778 (1978), so appellate judges are cognizant of information that they disregard in the performance of their judicial tasks.[16]

The upshot of this is that petitioners' claims are untenable.

III

We cannot pass this opportunity to put this case in a more rational perspective than it has been accorded by counsel and the media. This case emerges from society's continuing wrangling over the moral and social justification for capital punishment. Regrettably, the thunderous emanations of this great debate, and the manner in which this joint petition was presented to the Court, have cast a pall on the integrity of the painful process by which this Court attempts to deal with the responsibility it has been assigned. It seems to us both unwarranted and unseemly to villify those who endeavor to follow the constitution; we are, after all, the messengers, and not the message.

Florida's death penalty statute has been held constitutional time and time again.[17] We are obliged to apply it so long as the citizens of this state deem it an appropriate punishment for select acts of criminality, and so long as the United States Supreme Court tolerates its use. Views on the subject can always be addressed to the Florida legislature or to the people of Florida, but attempts to pervert judicial processes, or to castigate the judiciary, benefit no one in the resolution of this societal debate.

The petitions of Brown and the others for writs of habeas corpus and for other extraordinary relief are denied. The motion for

16. At oral argument on the joint petitions, counsel clarified petitioners' "proportionality taint" argument. He conceded that appellate judges receive and review all types of non-record information in the course of their duties, and that there is no impropriety in that occurring. He stated, moreover, that one constitutionally infirm decision by this Court would not itself skew the entire process by which we guarantee proportionality review in capital cases, so as to invalidate all other death sentences or the operation of the statute. He asserted, rather, that a systematic pattern of constitutionally defective review would be required for the relief requested, and he claimed to have found that pattern in the Court's having received in several cases, by request or otherwise, the "tainted" materials which were never displayed to counsel. As we view the case, of course, appellate review can never be compromised, in the constitutional sense required by *Proffitt*, by the receipt of any quantity of non-record information. *Cf. Goodman v. Olsen*, No. 45,356 (Fla. July 30, 1976), *cert. denied*, 430 U.S. 945, 97 S.Ct. 1579, 51 L.Ed.2d 792 (1977), where the United States Supreme Court denied review of an order of this Court which had rejected a request to invalidate a decision of this Court allegedly made on the basis of improper, non-record information.

17. We cannot help but observe that the operation of capital punishment laws has been dependent upon a changing set of procedural principles, *see Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), which have imposed shifting, supervisory standards on state high courts. The "tainted" information we are charged with reviewing was, as counsel concedes, in every instance obtained to deal with newly-articulated procedural standards. It would be ironic indeed if petitioners were successful in their assertion that our statute operates unconstitutionally because this Court has acted promptly from time to time to respond to new directives from the Supreme Court as to what procedures are required to make the statute operate in a constitutional manner.

appointment of a special master and sundry other relief is denied. The stays of execution for Carl Ray Songer and Lenson Hargrave are dissolved.

No petitions for rehearing will be entertained.

SUNDBERG, C. J., and ADKINS, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., concur.

BOYD, J., concurs in result with an opinion.

BOYD, Justice, concurs in result with an opinion.

I am convinced that no member of this court was influenced by any extraneous materials.

Although I don't agree with all the language in the majority opinion, I concur in the result.

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No. 80-6434

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOSEPH GREEN BROWN, et. al,

Petitioners,

-v.-

LOUIE L. WAINWRIGHT,

Respondent.

APPENDIX C
to
PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

58,732

IN THE

SUPREME COURT OF FLORIDA

CASE NO.

FILED

SEP 29 1980

JOSEPH GREEN BROWN, ALVIN BERNARD FORD, JESSE RAY HITCHCOCK, CARL ELSON SHRINER, DANIEL MORRIS THOMAS, AUBREY DENNIS ADAMS, JR., FRED LYMAN BRUMBLEY, DANIEL L. COLER, VERNON RAY COOPER, GREGORY SCOTT ENGLE, DAVID LIVINGSTON FUNCHESS, ROBERT D. HEINEY, MARVIN E. JOHNSON, LESLIE R. JONES, ROBERT F. LEWIS, BOBBY EARL LUSK, THOMAS McCAMPBELL, CHARLES DWIGHT MESSER, FLOYD MORGAN, DONALD PERRY, JAMES LEROY PHIPPEN, JAMES DAVID RAULERSON, JIMMIE LEE SMITH, WILLIAM GILVIN, BRYAN JENNINGS, RICHARD KING, GREGORY MILLS, ROBERT LEWIS BUFORD, WILLIAM CHRISTOPHER, RAYMOND ROBERT CLARK, ROBERT COMBS, RAYMOND L. DRAKE, EARL ENMUND, WILLIAM JENT, AMOS LEE KING, HAROLD GENE LUCAS, ANTHONY RAY PEEK, RALEIGH PORTER, M.C. RUFFIN, DONALD WALSH, JOHNNY PAUL WITT, STEVEN BEATTIE, McARTHUR BREEDLOVE, ALONZO BRYANT, BOBBY MARION FRANCIS, MARVIN FRANCOIS, LENSON HARGRAVE, RONALD JACKSON, ANTONIO MENENDEZ, THOMAS PERRI, WARDELL RILEY, LEON SCOTT, ROY STEWART, MERLE STURDIVAD, GARY TRAWICK, MANUEL VALLE, JAMES ADAMS, LEVIS LEON ALDRIDGE, ALLEN L. ANDERSON, DAVID ROSS DELAP, WILLIAM DUANE ELLEDGE, GEORGE VICTOR FRANKLIN, WILLIAM LANAY HARVARD, JAMES E. HITCHCOCK, MONROE HOLMES, JOHN P. MAGGARD, NOLLIE LEE MARTIN, WINDFORD MINES, ELDRED LONNIE MOODY, JAMES A. MORGAN, TOMMY LEE RANDOLPH, JAMES FRANKLIN ROSE, PAUL WILLIAM SCOTT, WILLIE CLAYTON SIMPSON, TERRY MELVIN SIMS, HENRY PERRY SIRECI, JR., JOSEPH ROBERT SPAZIANO, JESSE JOSEPH TAFERO, SOLOMON WEBB, WILLIAM GLENN WELTY, WILLIAM MELVIN WHITE, GARY ELDON ALVORD, ANTHONY ANTONE, LUIS CARLOS ARANGO, SAMPSON ARMSTRONG, ELLWOOD BARCLAY, RICHARD BLAIR, BERNARD BOLANDER, STEPHEN TODD BOOKER, THEODORE BUNDY, JOHNNY COPELAND, PRESTON CRUM, WILLIE JASPER DARDEN, BENNIE DEMPS, ERNEST JOHN DOBBERT, HOWARD VIRGIL LEE DOUGLAS, JOHN E. FERGUSON, CHARLES KENNETH FOSTER, ARTHUR FREDERICK GOODE, III, FREDDIE LEE HALL, CARL JACKSON, ELIGAAH ARDALLE JACOBS, THOMAS KNIGHT, JOHN WALLACE LeDUC, PAUL EDWARD MAGILL, ROY McKENNON, DOUGLAS RAY MEEKS, MARK MIKENAS, EDDIE ODOM, TIMOTHY PALMES, CHARLES WILLIAM PROFFITT, MICHAEL SALVATORE, FRANK SMITH, CARL RAY SONGER, WALTER STEINHORST, RUFUS STEVENS, RAYMOND R. STONE, RONALD STRAIGHT, ROBERT A. SULLIVAN, WILLIAM LEE THOMPSON, CHARLES VAUGHT, DAVID LEROY WASHINGTON, JAMES BUFORD WHITE,

Petitioners,

-v.-

LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida,

Respondent.

APPLICATION FOR EXTRAORDINARY RELIEF AND
PETITION FOR WRIT OF HABEAS CORPUS

Petitioners, through their undersigned counsel, apply to this Honorable Court for relief from their unconstitutional sentences of death and further appropriate relief, and, in support thereof, state:

I.

PARTIES

Petitioners are all death-sentenced inmates presently incarcerated at Florida State Prisoh in Starke, Florida, whose convictions and sentences were affirmed by or whose appeals are currently pending before this Court. (See Appendix A filed herewith).

Respondent, Louie L. Wainwright, is the Secretary of the Department of Corrections in whose custody the petitioners are detained.

II.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Article V, Section 3(b)(1), (7) and (9) of the Constitution of the State of Florida (1980). See Adams v. State, 380 So2d 421(Fla.1980); Graham v. State, 372 So2d 1363(Fla. 1979); Proffitt v. State, 360 So2d 771(Fla. 1978). Petitioners seek relief in this Court because the issues raised herein involve this Court's appellate review of capital cases and do not involve the proceedings in the trial courts. Petitioners have filed jointly in the interest of judicial economy because of the common issues of law and fact presented. See In Re Baker, 267 So2d 331(Fla.1972).

III.

FACTUAL BASIS FOR RELIEF

This Court, since at least as early as 1975, has engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal. The information includes but is not limited to: presentence investigation reports concerning the capital offense under review or prior convictions unrelated to the capital offense; psychiatric evaluations or contact notes; psychological screening reports; recitations of a capital defendant's refusal

to submit to a psychiatric examination from which a report could be prepared; post-sentence investigation reports; probation or parole violation reports; and state prison classification and admissions summaries. Documentation of the practice is provided by the correspondence attached as Appendix B which is merely exemplary. Petitioners also attach in Appendix C newspaper accounts of the practice. While such accounts are admittedly hearsay, they are well-substantiated by the documents in Appendix B.

Except as to some of the presentence investigations pertaining to the offense on appeal the above information was requested and received without notice to the capital appellants or their attorneys.

Upon information and belief, a quantity of the information received by the Court, and of records reflecting the practice of requesting and receiving it as alleged in the preceeding paragraph, has at the Court's direction been destroyed or purged from this Court's files. As a result, it is no longer possible for petitioners to identify all of the cases in which such information was requested or received.

IV.

LEGAL CLAIMS

The request or receipt by this Court of undisclosed information in capital cases, as described above, violates inter alia, petitioners' rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 9 of the Constitution of the State of Florida; the right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 16 of the Constitution of the State of Florida; the Eighth Amendment to the Constitution of the United States and Article I, Section 17 of the Constitution of the State of Florida; the privilege against self-incrimination as guaranteed by the Fifth Amendment to the Constitution of the United States and Article I, Section 9

of the Constitution of the State of Florida; the right to confrontation as guaranteed by the Sixth Amendment and Article I, Section 16 of the Constitution of the State of Florida; and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 2 of the Constitution of the State of Florida.

A. The Due Process Right to Fair Capital Procedures

The practice described above violates Gardner v. Florida, 430 U.S. 349(1977). In Gardner, the United States Supreme Court held unconstitutional the imposition of a death sentence where, in considering what sentence to impose, a Florida circuit court had ordered and relied on a pre-sentence investigation report, portions of which were not disclosed to the parties. The plurality emphasized that, in capital cases,

> it is now clear that the sentencing process as well as the trial iteself, must satisfy the requirements of the Due Process Clause . . . .

Id. at 358 (opinion of Mr. Justice Stevens). It held that due process was denied since "the death sentence was imposed, at least in part, on the basis of information which [petitioner] had no opportunity to deny or explain." Id. at 362. See also Green v. Georgia, 442 U.S. 95, 97(1979) and Presnell v. Georgia, 439 U.S. 14, 16(1978).

Gardner requires a similar conclusion here. The only real difference between Gardner and these cases is that here the secret information was gathered on appeal rather than at trial. Rather than providing a basis on which to distinguish these cases, this fact aggravates the unfairness to petitioners. The preparation of a pre-sentence report is a relatively normal and expectable occurrence in the trial court, and defense counsel might legitimately be expected to be on notice that such an event may happen, and, before Gardner at least, might engender confidential information. No lawyer familiar with Florida statutes, rules and procedures could be expected to anticipate, however, that without notice to the lawyer or the lawyer's client,

this Court would request or receive information dehors the record. Here, certainly no less than in Gardner, it would be a violation of the Fourteenth Amendment's Due Process Clause "to impose the death sentence on the basis of confidential information which is not disclosed to the defendant or his counsel." Gardner v. Florida, supra, 430 U.S. at 358.

It is a further violation of Due Process for this Court to have consulted "evidential facts not spread upon the record," Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U.S. 292,300(1937), so that "even now we do not know the particular or evidential facts of which the [Court]... took judicial notice and on which it rested its conclusion." Id. at 302.

It is also a violation of due process for an appellate court to rely for disposition of an appeal upon factual grounds other than those relied upon by the trial court. Presnell v. Georgia, supra; Eaton v. City of Tulsa, 415 U.S. 697(1974); Cole v. Arkansas, 333 U.S. 196(1948). To the extent that the affirmance of any of petitioners' cases was affected by information outside the trial record, their due process rights were further violated.

The Court's sua sponte consultation of extra-record materials and information in the consideration of capital appeals contravenes petitioners' fundamental rights to due process of law.

B. The Right to the Effective Assistance of Counsel

The guarantee of the effective assistance of counsel is as applicable on appeal as at trial. Anders v. California, 386 U.S. 738(1967); Ross v. State, 287 So2d 372(Fla.2d DCA 1973); Davis v. State, 276 So2d 846(Fla.2d DCA 1973), aff'd 290 So2d 30(Fla.1974). This right is denied not merely by the denial of counsel but by any hampering "restrictions upon the function of counsel in defending a criminal prosecution in accord with

the traditions of the adversary fact-finding process." Herring v. New York, 422 U.S. 853,857(1975). Accord: Ferguson v. Georgia, 365 U.S. 570(1961); Brooks v. Tennessee, 406 U.S. 605(1972); Geders v. United States, 425 U.S. 80(1976). In Gardner v. Florida, 428 U.S. 908,909(1976) certiorari was granted on both a Sixth and a Fourteenth Amendment question. In its decision, the Supreme Court of the United States held that "[e]ven though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel."[Citing Mempa v. Rhay, 389 U.S. 128(1967) and Specht v. Patterson, 386 U.S. 605(1967)]. Gardner v. Florida, 430 U.S. 349,358(1977). Implementing Gardner, this Court has recognized that counsel must be afforded adequate time to prepare pertinent rebuttal evidence in order for a defendant to be given a meaningful "opportunity to be heard." Barclay & Dougan v. State, 362 So2d 657,658(Fla.1978). This Court's request for or receipt of confidential information, without notice to or access by petitioners and their counsel, violates the petitioners' rights because their counsel are afforded no opportunity to explain, deny, or place in context the information. The exclusion of counsel from the process of weighing such information proceeds from the:

> erroneous premise that the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts. Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases.

Gardner v. Florida, supra, 430 U.S. at 360. On the appeal of a capital case, no less than at trial, the Sixth Amendment guarantees "the guiding hand of counsel" to a criminal defendant. Powell v. Alabama, 287 U.S. 45,57(1932).

C. The Right to Confrontation

The Sixth Amendment provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him." See generally Pointer v. Texas, 380 U.S. 400(1965); Douglas v. Alabama, 380 U.S. 415(1965).

> The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-243(1895). A defendant's Confrontation Clause rights are not limited to trial of the case but attach wherever evidence is admitted relevant to the issues to be adjudicated. "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." Lewis v. United States, 146 U.S. 370, 373(1892). A defendant is entitled to confront the witnesses against him in any proceeding "after the case is called for trial which involves his substantial rights." Hopt v. Utah, 110 U.S. 574, 578(1884). See also Rogers v. United States, 422 U.S. 35, 39-40(1975). The evidence which this Court has received has never been tested by the equivalent of cross-examination, cf. Ohio v. Roberts, ___U.S.___ 100 S.Ct. 2531(1980), and is of a notoriously unreliable sort (See ¶ D. infra). While in some limited circumstances, hearsay reports might be admissible if the prosecution makes a solid factual showing of the preparer's "unavailability" as a witness at the time of trial and if, in addition, the report bears adequate "'indicia of reliability'", Mancusi v. Stubbs, 408 U.S. 204, 213(1972), in the present cases, defense counsel

were unaware of the very existence of the reports that may have affected the appeals in petitioners' cases. There was no opportunity here to confront the reports themselves and the consequences of this Court's request or receipt of the reports, let alone the preparers of the reports.

D. The Eighth Amendment Right to Reliability in Capital Sentencing

In Woodson v. North Carolina, 428 U.S. 280, 305(1976) the Supreme Court recognized that, under the Eighth Amendment "death is a punishment different from all other sanctions in kind rather than in degree." "[T]his qualitative difference between death and other penalities calls for a greater degree of reliability when the death sentence is imposed." Lockett v. Ohio, 438 U.S. 586, 604(1978). Accordingly,

> [t]o insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. (Footnote omitted). Beck v. Alabama, ___U.S.___, 100 S.Ct. 2382, 2389-90 (1980).

It is hard to conceive of evidence more fraught with danger when considered ex parte than the subjective psychiatric/psychological/correctional reports received by this Court, unsubjected to professional explanation and adversarial cross-examination. Addington v. Texas, 441 U.S. 418(1979); Smith v. Estelle, 602 F.2d 694(5th Cir.1979), cert. granted, 100 S.Ct. 1311(1980). See generally, Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Calif. L. Rev. 693(1974). As the Supreme Court of the United States stated in Kent v. United States, 383 U.S. 541, 563(1966):

> [T]here is no irrebutable presumption of accuracy attached to staff reports. If a decision on [the sentence of life or death] . . . is 'critically important' it is equally of 'critical importance' that the material submitted to the judge . . . be subjected, within reasonable

> limits . . . to examination, criticism and refutation.

The risk that an appellant may be the victim of inaccurate information is precisely the same here as in Gardner. In a case where a mistake may send an appellant to his electrocution, the risk is simply not a constitutionally acceptable one:

> From the point of view of the defendant [the penalty of death] is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Id. at 357-358. See also Godfrey v. Georgia, ___U.S.___, 64 L.Ed. 2d 398, 409(1980). In the words of Mr. Justice Overton, "often secrecy is considered the opposite of credibility," Forbes v. Earle, 298 So2d 1, 4(Fla. 1974).

E. The Eighth Amendment Right to Proportionality in Capital Sentencing

The Eighth Amendment requires that the death penalty be applied in accordance with a rational and regular sentencing procedure which takes into account both the nature of the crime and the culpability of the individual offender. Woodson v. North Carolina, 428 U.S. 280, 303(1976). The constitutionality of Florida's capital punishment statute was upheld in 1976 on the explicit assumption that review in this Court would be satisfactory to guard against capricious and disproportionate infliction of the death penalty:

> [M]eaningful appellate review of each . . . [death] sentence is made possible, and the Supreme Court of Florida . . . considers its function to be to '[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.... in light of the other decisions and determine whether or not the punishment is too great'. State v. Dixon, 283 So2d 1, 10(1973).

Proffitt v. Florida, 428 U.S. 242, 251(1976). The secret use of sentencing evidence by this Court "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett v. Ohio, 438 U.S. 586, 605(1978). Accord: Beck v. Alabama, ___U.S.___, 100 S.Ct. 2382, 2389(1980).

The sua sponte request and receipt of evidence by this Court makes it impossible to assure either that the Court's general appellate function or the Court's role as the third step in the "trifurcated" sentencing process will not result in the capricious or disproportionate imposition of the death penalty. The formal record on the basis of which the death sentence is imposed will necessarily be incomplete, with parts of it invisible to counsel, to the trial courts, to the federal courts, and to this Court itself as Justices change over time. This is a constitutional defect, for the handling and treatment of confidential sentencing information in a death case is not simply a matter of this Court's discretion. In Gardner v. Florida, supra, the State argued that "trial judges can be trusted to exercise their discretion in a responsible manner, even though they may base their decisions on secret information." 430 U.S. at 360. The Court expressly rejected this argument as "clearly foreclosed," ibid., by Furman v. Georgia, 408 U.S. 238(1972) and "inconsistent with the basis upon which the Florida capital-sentencing procedure was upheld, Proffitt v. Florida, 428 U.S. at 254," id. at 360 n. 11. The Court recognized an Eighth Amendment right to a full and complete record in order to insure that the death penalty is applied proportionately and non-arbitrarily:

> Since the State must administer its capital sentencing procedures with an even hand, see Proffitt v. Florida, 428 U.S. at 250, it is important that the record on appeal disclose to the reviewing court the considerations

> which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia. Gardner v. Florida, supra, 430 U.S. at 361 (footnote omitted).

Further, where this Court opens itself to a major category or kind of information in some cases, but not others, proportionality is precluded.

Where neither the trial records nor this Court's decisions reflect accurately all of the information before the court in deciding capital cases, trial and appellate counsel, trial judges, and federal courts on review are deprived of the necessary basis on which to compare cases and insure that consistent standards are being applied in capital sentencing.

The receipt by this Court of different information in different cases -- information which was not before the trial jury or judge -- has eviscerated the system of checks and balances the trifurcated Florida death penalty structure was designed to guarantee. See Proffitt v. Florida, supra; Miller v. State, 332 So2d 65(Fla. 1976); Messer v. State, 330 So2d 137 (Fla. 1976). It has destroyed the statewide "consistency, fairness, and rationality in the evenhanded operation of the state law" which the Supreme Court of the United States believed to be guaranteed by the Florida capital sentencing procedure when it found that procedure facially constitutional in Proffitt v. Florida, supra, 428 U.S. at 260. The Court's practice thus has prejudiced all capital appellants, both those for whom information may have been received and those for whom it was not.

F. The Right Against Self-Incrimination and the Right of the Assistance of Counsel in Deciding Whether to Exercise that Right

An interview with correctional employees or mental health professionals who are obtaining information from an inmate is fundamentally unlike a court-ordered psychiatric examination after a defendant has himself put his sanity in issue. In the

latter case, the defendant may be deemed to have waived the right to object to such an interview. In the former case, however, the Fifth Circuit has recently held that the State may not interview an inmate without notice and waiver of his rights, when the interview will subsequently be admitted in a capital sentencing proceeding, because the inmate has a Fifth Amendment right to refuse to participate in the interview and a Sixth Amendment right to consult with his counsel concerning whether to be interviewed. Smith v. Estelle, 602 F.2d 694(5th Cir. 1979), cert. granted, 100 S.Ct. 1311(1980).

It appears clear that in the present cases, as in Smith, the death row prisoners were not told that the information derived from interviews conducted by correctional employees or mental health professionals would be forwarded to this Court, nor were they told that they had a right to refuse to participate in the interviews. See Smith v. Estelle, supra at 602 F.2d 707-708. If, under the Fifth Amendment, "a defendant may not be compelled to speak to a psychiatrist who can use his statements against him at the sentencing phase of a capital trial." Smith v. Estelle, supra, 602 F.2d at 708, then that right was completely negated here.

Furthermore, petitioners were denied the advice of counsel at a critical stage of the sentencing proceedings in their cases. For, while an attorney may have no right to be present with an inmate during an interview by a psychiatrist, see United States v. Cohen, 530 F.2d 43(5th Cir.1976), the attorney has a highly important role in assisting the inmate to decide whether the inmate should waive his Fifth Amendment rights:

> This is a vitally important decision, literally a life or death matter. It is a difficult decision even for an attorney; it requires a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, of possible alternative strategies at the sentencing hearing. For a lay defendant, who is likely to have no idea of the vagaries of expert testimony and its possible role in a capital trial, and who may well find it difficult to understand, even if he is told, whether a psychiatrist is examining his competence, his sanity, his long-term

> dangerousness for purposes of sentencing, his short-term dangerousness for purposes of civil commitment, his mental health for purposes of treatment, or some other thing, it is a hopelessly difficult decision. There is no reason to force the defendant to make it without 'the guiding hand of counsel' Powell v. Alabama, 287 U.S. 45, 57, 53 S.Ct. 55, 77 L.Ed. 158(1933).

Smith v. Estelle, supra, 602 F.2d at 708-709. See also Brewer v. Williams, 430 U.S. 387, 398(1977). These petitioners have been deprived of the advice of counsel as to their decisions whether to put their lives in the hands of prison personnel or other agents of the State. "The guiding hand of counsel is needed lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact and in law committed." Tomkins v. Missouri, 323 U.S. 485,489 (1945). Just as "a prisoner is not 'to be made the deluded instrument of his own conviction,' 2 Hawkins, Pleas of the Crown(8th ed. 1824),595," Culombe v. Connecticut, 367 U.S. 568, 581(1961)(opinion of Mr. Justice Frankfurter), neither may he be made the deluded instrument of his own execution.

G. Conclusion

The practice of this Court of requesting or receiving undisclosed information in capital cases has infected and prejudicially skewed its review of every death sentence. Under the Florida death penalty scheme, the ultimate safeguard for insuring that the process of imposing death sentences is fair, reliable and even-handed is the appellate review required to be provided by this Court. All capital appellants have suffered from this Court's practice of securing secret information. The capital sentencing process in Florida has been distorted from the form in which it was approved by the Supreme Court of the United States, and has become tainted at its highest and most important judicial level.

When the Court's decision is one involving the

ultimate penalty of death, the Constitution cannot tolerate anything short of full notice and disclosure of any and all facts being fed into the life and death equation. One of the tripartite pillars of the trifurcated sentencing process of Florida has become cracked.

V.

PRAYER FOR RELIEF

Based upon the foregoing, petitioners respectfully request their unconstitutional sentences of death be vacated and that the Court grant such other relief as may be deemed proper.

Respectfully submitted,

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William Duane Elledge
George Victor Franklin
William Lanay Harvard
James E. Hitchcock
Monroe Holmes
John P. Maggard
Nollie Lee Martin
Windford Mines
Eldred Lonnie Moody
James A. Morgan
Tommy Lee Randolph
James Franklin Rose
Paul William Scott
Willie Clayton Simpson
Terry Melvin Sims
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James Buford White

BY: _____
MARVIN E. FRANKEL

_____
ALBERT J. DATZ

_____
SAMUEL S. JACOBSON

_____
DEBORAH FINS

_____
DAVID E. KENDALL

_____
ANTHONY G. AMSTERDAM

_____
MICHAEL J. MINERVA

_____
DAVID J. BUSCH

_____
LOUIS G. CARRES

_____
MICHAEL M. CORIN

_____
JUDITH J. DOUGHERTY

_____
MARGARET GOOD

_____
THEODORE E. MACK

_____
CARL S. McGINNES

_____
JAMES R. WULCHAK

_____
for PAUL C. HELM

_____
KAREN M. GOTTLIEB

_____
ELLIOT H. SCHERKER

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JERRY L. SCHWARZ

RICHARD B. GREENE

ELLEN S. MORRIS

JON MAY

CLIFFORD L. DAVIS

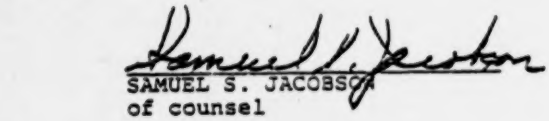
WILLIAM P. WHITE, III

PHILLIP JOHN PADOVANO

JOSEPH JORDAN (by P.P.)

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida 32304 by hand delivery this 29th day of September, 1980.



SAMUEL S. JACOBSON
of counsel

IN THE SUPREME COURT OF FLORIDA

JOSEPH GREEN BROWN, et al.,

Petitioners

-v.-

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
State of Florida,

Respondent.

CASE NO.

APPENDICES TO

APPLICATION FOR EXTRAORDINARY RELIEF AND

PETITION FOR WRIT OF HABEAS CORPUS

APPENDIX A

(Petitioners' Names & Case Numbers)

Joseph Green Brown	#46,925	John P. Maggard	#51,614
Alvin Bernard Ford	#47,059	Nollie Lee Martin	#55,716
Jesse Ray Rutledge	#48,801	Windford Mines	#50,996
Carl Elson Shriner	#51,749	Eldred Lonnie Moody	#52,907
Daniel Morris Thomas	#51,692	James A. Morgan	#53,418
Aubrey Dennis Adams, Jr.	#56,134	Tommy Lee Randolph	#54,869
Fred Lyman Brumbley	#56,006	James Franklin Rose	#51,724
Daniel L. Coler	#54,250	Paul William Scott	#58,588
Vernon Ray Cooper	#45,966	Willie Clayton Simpson	#49,681
Gregory Scott Engle	#57,708	Terry Melvin Sims	#57,510
David Livingston Funchess	#47,828	Henry Perry Sireci, Jr.	#50,905
Robert D. Heiney	#56,778	Joseph Robert Spaziano	#50,250
Marvin E. Johnson	#56,167	Jesse Joseph Tafero	#49,535
Leslie R. Jones	#56,199	Solomon Webb	#58,306
Robert F. Lewis	#50,851	William Glenn Welty	#55,497
Bobby Earl Lusk	#59,146	William Melvin White	#55,875
Thomas McCampbell	#57,026	Gary Eldon Alvord	#45,542
Charles Dwight Messer	#49,780		57,810
Floyd Morgan	#54,939	Anthony Antone	#50,240
Donald Perry	#53,003	Luis Carlos Arango	#59,678
James Leroy Phippen	#54,664	Sampson Armstrong	#48,516
James David Raulerson	#47,991	Ellwood Barclay	#47,260
Jimmie Lee Smith	#55,961	Richard Blair	#58,072
William Gilvin	#58,743	Bernard Bolander	#59,333
Bryan Jennings	#59,299	Stephen Todd Booker	#55,568
Richard King	#59,464	Theodore Bundy	#57,772
Gregory Mills	#59,140	Johnny Copeland	#57,788
Robert Lewis Buford	#54,010	Preston Crum	#57,487
William Christopher	#55,698	Willie Jasper Darden	#45,056
Raymond Robert Clark	#52,716		45,108
Robert Combs	#59,425	Bennie Demps	#54,249
Raymond L. Drake	#54,580	Ernest John Dobbert	#45,558
Earl Enmund	#48,525	Howard Virgil Douglas	#44,864
William Jent	#58,744	John E. Ferguson	#55,137
Amos Lee King	#52,185		55,498
Harold G. Lucas	#51,135	Charles Kenneth Foster	#48,380
		Arthur F. Goode, III	#51,480
Anthony Ray Peek	#54,226		59,453
Raleigh Porter	#55,841	Freddie Lee Hall	#54,423
M.C. Ruffin	#55,684		54,561
Donald Walsh	#59,512	Carl Jackson	#48,165
Johnny Paul Witt	#45,796	Eligaah Ardalle Jacobs	#49,345
	58,329	Thomas Knight	#47,599
Steven Beattie	#56,569	John Wallace LeDuc	#47,953
McArthur Breedlove	#56,811	Paul Edward Magill	#51,699
Alonzo Bryant	#53,230	Roy McKennon	#54,172
Bobby Marion Francis	#50,127	Douglas Ray Meeks	#47,533
Marvin Francois	#54,461		48,080
Lenson Hargrave	#48,135	Mark Mikenas	#49,928
Ronald Jackson	#47,269	Eddie Odom	#50,575
Antonio Menendez	#49,294	Timothy Palmes	#52,045
Thomas Perri	#57,142	Charles W. Proffitt	#45,541
Wardell Riley	#49,666	Michael Salvatore	#48,513
Leon Scott	#56,419	Frank Smith	#57,743
Roy Stewart	#57,971	Carl Ray Songer	#45,584
Merle Sturdivad	#59,416		52,642
Gary Trawick	#57,077	Walter Steinhorst	#55,087
Manuel Valle	#54,572	Rufus Stevens	#57,738
James Adams	#45,450	Raymond R. Stone	#48,275
Levis Leon Aldridge	#46,598	Ronald Straight	#52,460
Allen L. Anderson	#52,771	Robert A. Sullivan	#44,750
David Ross Delap	#56,235	William Lee Thompson	#55,697
William Duane Elledge	#52,272	Charles Vaught	#52,835
George Victor Franklin	#52,971	David L. Washington	#50,832
William Lanay Harvard	#47,052		50,833
James E. Hitchcock	#51,108		50,850
Monroe Holmes	#48,392	James Buford White	#54,292

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Sarah Caney,
Clerk's Office
Supreme Court
Requested OSI / psychological
Evaluation - advised will have
needed - Referred her to
Ed Stanick, DCR for grounds
Judge Ervin

F Bruce

Copy from Jimmie Lee Jones
File #039425 - copy made
on 9-5-80
S.O Ct # 44,669
Original is dated 1/11/75 & 9/11/75

Best Copy Available

MEMO TO THE FILE

August 29, 1975

Michael E. Provence CO# 175442

On 8/29/75 I was notified by Mr. Boone in our Bradenton office that the Florida Supreme Court had ordered the Clerk of the Manatee County Circuit Court to submit a copy of the PSI to the Court in this case. From reviewing this file it appears that Provence was convicted by jury of Murder In The First Degree on 10/24/74 and it appears that the jury recommended a sentence of Life. Judge Gilbert A. Smith ordered a PSI (contrary to 948.01(a)F.S.) and after it was submitted, Judge Smith sentenced this individual to Death. A review of the report indicates that Officer Thomas S. McCall might have gotten emotionally involved in his report but in the Analysis he made a recommendation that Provence be sentenced to Death. It is believed that Provence is appealing the conviction as well as the sentence and therefore the Supreme Court has asked for a copy of the PSI. The Clerk of the Circuit Court was trying to obtain a copy of the PSI from Mr. Boone who was reluctant to cooperate, to the degree that the Clerk was trying to obtain a court order. I asked Mr. Boone to discuss this with Judge Smith who had no objections to Mr. Boone supplying the Clerk with a copy of the factual part of the PSI but explicitly instructed him not to supply the Clerk with a copy of the Confidential section.

I have specifically instructed Mr. Boone and Mr. Otts to discuss this situation with Judge Smith, in hopes that no further request for PSI's on possible death cases be ordered. Besides being contrary to law, this is grossly unfair to our staff and the officer can be blamed for the Judge's decision, even though the Court will accept the blame themselves. Mr. Otts believes that Judge Smith will understand our problem and cooperate.

WGK

2

IN THE CIRCUIT COURT, IN AND FOR MANATEE COUNTY, FLORIDA

DISTRICT "13"
RECEIVED
SEP 22 1975
PAROLE & PROBATION COMMISSION

STATE OF FLORIDA, :

Plaintiff, :

vs. : Case No. 73-419F

MICHAEL EDWARD PROVENCE, :

Defendant. :

:

FILED FOR RECORD
M. T. McINNIS
CLERK CIRCUIT COURT
MANATEE CO. FLORIDA
SEP 22 11 12 AM '75

ORDER

THIS CAUSE having come on before this Court on the order of the Florida Supreme Court to supplement the Record by including the presentence investigation, and this Court having supplemented the Record by directing the inclusion of the objective, nonconfidential portion of the presentence investigation, this Court hereby finds:

1. That there is a confidential portion of the presentence investigation which was considered by the Court and that the confidential portion of the presentence investigation is presently in the custody of the Parole and Probation Commission,

2. That the order of the Florida Supreme Court does not specifically direct inclusion of the confidential portion of the presentence investigation, and it is hereby

ADJUDGED that until further notice from the Florida Supreme Court, the Parole and Probation Commission shall not furnish the confidential portion into the Record on this case.

ORDERED at Bradenton, Florida, this 19th day of September, 1975.

Gilbert A. Smith

GILBERT A. SMITH
CIRCUIT JUDGE

STATE OF FLORIDA, COUNTY OF MANATEE
This is to certify that the foregoing is a true and correct copy of the documents on file in my office.
Witness my hand and official seal this 22nd day of September, 1975
M. T. McInnis,
Clerk of Circuit Court
By _____ D.C.

Best Copy Available

175-442

FLORIDA PAROLE AND PROBATION COMMISSION
Inter-Office Communication

Date: 9/23/75

To: Mr. Paul Murchek, Director
ATTN: Mr. William Kyle
From: Floyd E. Boone

Office: COURT ORDER/1st DEGREE MURDER

Office: 13 - Bradenton

Re: Michael Edward Provence

Co. No. U/K Dist. No. 13-19701

Please find attached a court order signed by Circuit Judge Gilbert A. Smith on 9/19/75, stipulating that the Florida Parole and Probation Commission shall not furnish the confidential portion into the record in this case.

FEB/em F.E.B.

cc: Mr. Otts

4

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A.D., 1975

THURSDAY, SEPTEMBER 25, 1975

MICHAEL EDWARD PROVENCE,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

CASE NO. 46,671

It is hereby ordered that the confidential portion of the presentence investigation in the above styled cause, presently in the custody of the Parole and Probation Commission, be forwarded to this Court.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

TC
cc: Hon. Gilbert A. Smith, Judge
Hon. M. T. McInnis, Clerk
Hon. Charles H. Livingston
Hon. Robert L. Shevin
Florida Parole and Probation Comm.

Best Copy Available

September 26, 1975

The Honorable Sid J. White, Clerk
Supreme Court
Tallahassee, Florida

RE: Michael Edward Provence
vs.
State of Florida
Case No. 46,671

Dear Mr. White:

Persuant to the Supreme Court decision of September 25, 1975, please find attached the Presentence Investigation on the above-named.

Sincerely yours,

Harry T. Dodd
Administrative Assistant

HTD:kb

Attachment

6

Best Copy Available

September 29, 1975

Michael Edward Provence
vs.
State of Florida
Case #46,671

The Honorable Sid J. White
Clerk, Supreme Court of Florida
Tallahassee, Florida, 32304

Dear Mr. White:

Pursuant to the Supreme Court Order dated September 25, 1975, please find attached the Presentence Investigation concerning the above named individual.

Very truly yours,

Ray H. Howard
Chairman

D/cw

Attachment: Pre-sentence Investigation

Best Copy Available

MEMO TO THE FILE

September 10, 1975

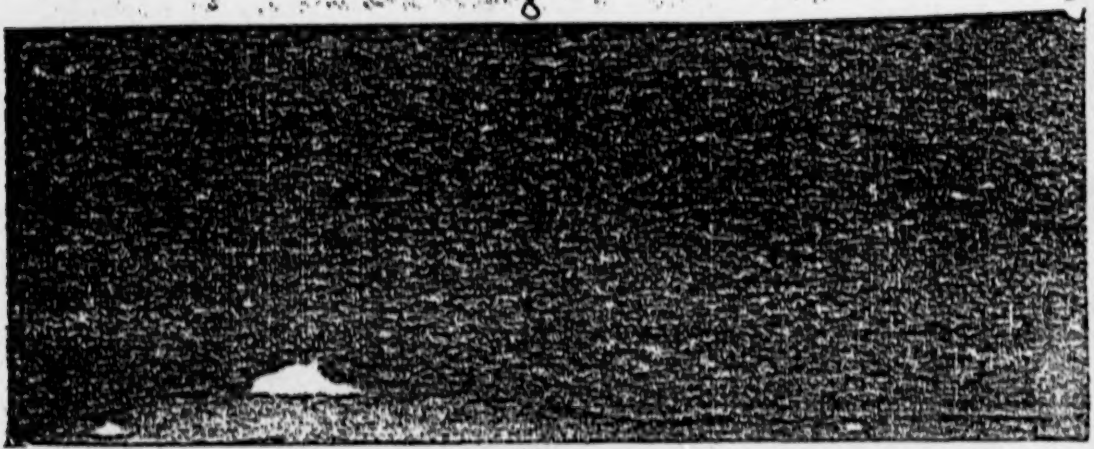
RE: Charles Messer
CO#139613

On 9-18-75 Mrs. Sara Gainey of the Clerk's office, Supreme Court called to request a copy of the pre-sentence investigation in this case.

After this matter was discussed with Mr. Howard and Mr. Murchek and Mr. Simmons it was determined that we would give them a pre-sentence if it was available.

After reviewing the file, it was found that there was no pre-sentence and Mrs. Gainey was advised this date that there was no pre-sentence available in this case.

/cr



IN THE SUPREME COURT OF FLORIDA

CHARLES DWIGHT MESSER,	:	
Appellant,	:	
v.	:	CASE NO. 49,780
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

PETITION FOR REHEARING

Petitioner, CHARLES DWIGHT MESSER, by his undersigned counsel, hereby petitions this Court pursuant to Florida Appellate Rule 3.14 to grant rehearing on the issues raised in this appeal, and petitioner respectfully suggests that this Court omitted or neglected to fully consider the following:

A. Defendant's Pending Motion To Clarify And The Failure Of The Trial Court To Provide The Pre-Sentance Investigation Report.

On June 16, 1977, this Court directed the trial judge below to file a response stating whether he imposed the death sentence in consideration of any information not known to appellant. This Court also directed the trial judge to furnish copies of his response along with copies of any sentencing information to the Court and both counsel for the state and counsel for appellant. This directive was issued by this Court pursuant to Gardner v. Florida, 430 U.S. 349 (1977).

On September 26, 1977 the trial judge issued his response stating twice that he had considered a pre-sentence investigation report and further stating that he was ordering the Clerk of the Court to send copies of that report along with copies of psychiatric and psychological reports to this Court. Upon receipt of the trial judge's response, counsel for appellant timely

filed, on October 3, 1977, a motion in this Court requesting that the trial judge be required to clarify his response to indicate whether these reports had been furnished to appellant or his trial counsel. This was necessary because although the trial judge had indicated that he saw a pre-sentence investigation report, he did not state whether that report had been furnished to the defendant or trial counsel. As of this date, counsel for appellant has received no reponse to his motion, has received no response from the trial judge, and no copies of the reports have been filed in this Court or furnished to counsel for appellant.

Pursuant to Florida Appellate Rule 3.9, counsel for appellant had the right to believe that the proceedings in this cause were suspended until his motion was disposed of or at the very least, until this Court had reviewed the reports and determined whether there had been a violation under Gardner, supra. However, on April 26, 1979, this Court issued its opinion affirming appellant's conviction with no mention, whatsoever, of the possible Gardner violation. Counsel for appellant, upon receiving this opinion, checked his file and then checked this Court's file to determine what action, if any, had been taken pursuant to his motion. Upon reviewing this Court's file, counsel for appellant could find no action taken on his motion, no pre-sentence investigation or psychiatrical reports, and by checking the Clerk's docket, could find no indication that any such reports had been furnished to the Court. This Court's records do contain a letter from someone stating that they had no pre-sentence investigation report on appellant. This, however, does not mean that such a report was not prepared and certainly does not explain the trial judge's

emphatic response that he had reviewed such a report. Appellant would contend that such facts warrant a full hearing at the trial level to determine exactly what happened to the pre-sentence investigation report and to determine exactly what the trial judge considered at sentencing that was not furnished to appellant or his trial counsel. Since Gardner, supra, seems to require not only a disclosure of such a pre-sentence investigation report but also a review of that report by this Court, it is essential that the report be provided as ordered by the trial judge. Until a determination has been made by the trial court on this matter, all proceedings in this case should be stayed and this Court should withdraw its opinion of April 26, 1978, pending a full review of the possible Gardner violation.

B. Secret Psychological Report Ordered By This Court

It must also be noted here in appellant's petition for rehearing that while reviewing this Court's record on appeal in this case, counsel for appellant found a copy of a letter from this Court to the Department of Offender Rehabilitation requesting a copy of the latest psychological report pertaining to the appellant. No copy of this letter was ever furnished to counsel for appellant. Counsel for appellant is aware that the Florida State Prison conducts psychological screening reports on all new inmates. Counsel for appellant also has personal knowledge that in other death cases pending before this Court, that this Court has requested and received such psychological reports without appellate counsel being notified. Upon finding a copy of this letter in the Court file, counsel for appellant attempted to determine if this Court had received such a report but counsel was informed that after the Gardner decision, all death cases were "purged" of such

information.

Under these circumstances, counsel for appellant would request that this Court conduct a full hearing of its own to determine whether or not the psychological screening report was received and the date on which it was received by this Court, when and under whose direction that report was destroyed, and whether or not that report was read and considered by any members of this Court.

Counsel for appellant feels that he must raise this question in his petition for rehearing in order to avoid any waiver of his client's rights. It is apparant, however, that this Court's actions have raised a question that must be resolved pursuant to Gardner, supra, to determine whether the death sentence was imposed on appellant, at least in part, on the basis of a record containing information of which he had no knowledge or opportunity to deny or explain.

It is clear that any secret report is not permissible in death penalty proceedings and violates the process which the defendant is due in such cases. See Gardner, supra, at page 360. Review by this Court is clearly part of the procedure employed in this state for determining which persons receive the death penalty. As noted by Justice White in his concurrence Gardner, supra, at 364:

> "A procedure for selecting people for the death penalty which permits consideration of such secret information relevent to the 'character and record of the individual offender,' . . . . [Woodson v. North Carolina, 428 U.S. at 304], fails to meet the 'need for reliability in the determination that death is the appropriate punishment' which the Court indicated was required in Woodson, supra, at 305."

It should also be noted that if psychological reports were before the Court in any other cases then

Gardner is applicable. As pointed out in Gardner, supra, at 361:

> "Since the state must administer its capital sentencing procedures with an even hand, see Proffit v. Florida, 428 U.S., at 250, it is important that the record on appeal disclosed to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida Capitol Sentencing Procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia."

C. Allowing Opinion Which Reaches The Ultimate Issue Being Determined To Be Offered By Jury To Prosecutor.

Concerning this Court's opinion filed on April 26, 1977, in the above styled cause, counsel for appellant would respectfully point out that by determing that the State Attorney could give his opinion as to aggravating and mitigating circumstances present, this Court not only failed to point out what rule of evidence allowed such testimony, it also failed to recognize that by making such a ruling it was overturning long-standing case law on the subject. As recently as this year, the Second District Court of Appeal had pointed out in Mills v. State, 367 So.2d 1068, 1069 (Fla. 2nd DCA, 1979) that:

> "A non-expert witness may not express opinions or conclusions which the jury could draw from the facts to which he had testified."

Moreover, the court in Mills pointed out that such error was clearly reversible because the opinion dealt with the ultimate issue to be decided.

In the sentencing portion of a death case, the ultimate issue to be determined by the jury is what aggravating and mitigating circumstances exist and whether or not the aggravating circumstances outweigh the mitigating circumstances. By allowing the

State Attorney's opinion testimony on the ultimate issue to be decided this Court has either: (1) overruled the long-standing case law pertaining to such testimony or (2) determined that error which would otherwise be reversible in other types of criminal cases is not reversible in a death case.

D. Allowing Testimony To Negate Mitigating Factors.

In determining that it was proper for the State Attorney to take the stand and testify at the second sentencing hearing, this Court stated at page three of its opinion:

> "The state sought to present this testimony in order to counter any inference, unfavorable to the state's case on this issue of sentence, that the jury might draw from being informed of the final disposition of the charges against the accomplice. The testimony also tended to negate various statutory mitigating circumstances. We hold that the state attorney's testimony was relevent for these purposes and was properly admitted." (emphasis added)

After finding that it was proper for the State Attorney to testify in order to negate various mitigating circumstances, this Court goes on to find at page three:

> "We find further from the record that there was no evidence tending to establish the existence of any mitigating factors. The sentence of death was proper."

Counsel for appellant is in a quandary as to why, if there were no mitigating factors, would the State Attorney be allowed to testify to negate them. On the other hand, if the State Attorney had to be allowed to testify to negate mitigating factors, then evidence of mitigating factors must have been present that the jury could have considered. It appears as if the decision allows the State to have its cake and eat it too. The problem can be resolved in one of two ways, either by finding that no mitigating factors

existed, thus requiring a new sentencing proceeding wherein the State Attorney would be prohibited from testfying, or, in the alternative, by finding that mitigating factors did exist, in which case a new sentencing hearing is required based on the fact that this Court had ruled out but all two of the aggravating factors argued below. See Elledge v. State, 346 So.2d 998 (Fla. 1977).

The State Attorney's testimony raises an additional problem when this Court allows the State to negate mitigating factors that the Court finds do not exist. If this Court allows its decision to stand, the state will hereafter be allowed to argue at sentencing proceedings the absence of mitigating factors. Such a ruling directly conflicts with this Court's decision in Mikenas v. State, 367 So.2d 606 (Fla. 1978). In that decision, this Court held that it was error for the trial judge to consider a non-statutory aggravating circumstance which was the antithesis of a mitigating circumstance. In so doing, this Court declared that it was improper to consider the lack of a mitigating circumstance as an aggravating circumstance. In this instant case, to allow the State to negate mitigating factors which this Court determined do not exist, is the same as allowing the State to argue the lack of mitigating factors as an aggravating factor. This is in direct conflict with Mikenas.

E. Erroneous Resolution Of Aggravating/Mitigating Issues.

Finally, counsel for appellant would urge that this Court's elimination of all but two aggravating circumstances requires that appellant be remanded to trial court for a new sentencing proceeding. Obviously, the State and this Court believe that there was

sufficient evidence of mitigating factors present as shown by the fact that the State was permitted to present the State Attorney's testimony to negate those factors. Indeed, the testimony of Dr. McMahon, alone, was sufficient to give the jury reason to find one mitigating circumstance, that of impairment of appellant's capacity to appreciate the criminality of his conduct. See Shue v. State, 366 So.2d 387 (Fla. 1978). This Court cannot stand as the trier of fact and determine that the sentencing jury did not consider Dr. McMahon's testimony of appellant's mental state as establishing a mitigating factor to be wieghted against the aggravating factors presented, since no specific findings were returned by the jury. As pointed out by this Court in Shue v. State, supra:

> "It is impossible to say that there was no reasonable basis for the jury to have concluded that some mitigating circumstances existed sufficient to outweight the aggravating circumstances."

Furthermore, as the United States Supreme Court has pointed out in Lockett v. Ohio, ___ U.S. ___, 98 S.Ct. ___, 57 L.Ed.2d 973, 990 (1978):

> . . . "The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

In the instant case it is entirely possible that the jury considered at least one mitigating circumstance to be weighted against the several aggravating circumstances presented by the State because evidence of such a mitigating factor was presented to them. Since this Court has corrected the trial court to show that only two aggravating factors could have existed, the aggravating and

mitigating factors must now be placed back before the jury to determine if the mitigating factors now outweight the aggravating.

WHEREFORE, appellant prays this Court will grant re-hearing in this case, require hearings on the Gardner issues presented, and remand this case for a new sentencing proceeding in accordance with this Court's findings relating to the aggravating and mitigating circumstances present.

Respectfully submitted,

THEODORE E. MACK
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing motion was furnished by hand-delivery to the Honorable Jim Smith, Attorney General, the Capitol Building, Tallahassee, Florida, on this 10th day of May, 1979.

THEODORE E. MACK

MEMO TO THE FILE

September 10, 1975

RE: Clarence Robert Purdy
CO#176763

On 9-18-75 Mrs. Sara Gainey of the Clerk's office, Supreme Court called to request a copy of the pre-sentence investigation in this case.

After this matter was discussed with Mr. Howard and Mr. Murchek and Mr. Simmons it was determined that we would give them a pre-sentence if it was available.

After reviewing the file, it was found that there was no pre-sentence and Mrs. Gainey was advised this date that there was no pre-sentence available in this case.

Curtis B.

/cr

MEMO TO THE FILE

September 10, 1975

RE: George Thomas Vasil
CO#175497

On 9-18-75 Mrs. Sara Gainey of the Clerk's office, Supreme Court called to request a copy of the pre-sentence investigation in this case.

After this matter was discussed with Mr. Howard and Mr. Murchek and Mr. Simmons it was determined that we would give them a pre-sentence if it was available.

After reviewing the file, it was found that there was no pre-sentence and Mrs. Gainey was advised this date that there was no pre-sentence available in this case.

/cr

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1975

WEDNESDAY, DECEMBER 3, 1975

RONALD JACKSON,	**	
Appellant,	**	
vs.	**	CASE NO. 47,269
STATE OF FLORIDA,	**	
Appellee.	**	
	**	

It is hereby ordered that the Parole and Probation Commission transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this cause.

WITNESS the Honorable James C. Adkins, Chief Justice of the Supreme Court of Florida, and the Seal of said Court at Tallahassee, the Capital, on this the 3rd day of December, 1975.

Sid J. White

Clerk of the Supreme Court of Florida.

Honorable Paul M. Murchek
Law Offices of Jack J. Taffer
Honorable Carolyn M. Snurkowski

A TRUE COPY
Attest
SID J. WHITE, Clerk
Supreme Court of Florida

By _____
Deputy Clerk

Month	Day	Year	ENTRIES
4	24	75	Notice of Appeal
			Lic. (15 vols.)
			[illegible]
10	1	75	Appellant's Briefs
10	3	75	Appellants Mot. etc Supplement Record on Appeal
	"		Request for C.A.
10	7	75	Appellant's Motion to Supplement Rec. on Appeal Granted
10	8	75	State's Exhibit #11 & #12 (Photographs)
10	23	75	Appellee's Motion for ext. of time til
11	21	75	Appellee's Brief
11	25	75	O.A. granted
12	3	75	Order asking Parole Commission to transmit pre-sentence investigation to the Clerk
12	4	75	Copy of Probation Investigation
6	15	77	Order of the Court ordering trial judge to respond in 20 days re: Gardner decision
7	7	77	Response to Supreme Court
10	26	78	Opinion (PC) Judgment [illegible] Con. Affirmed
11	8	78	Motion to withdraw
11	8	78	Mot for ext. of time to file Pet for Rehearing
11	8	78	Mot for appt. Office of P.D. for Appellant
11	8	78	Affidavit of Indigency
11	9	78	Order - grant. Mot to withd; mot ext. of time; Appt P.D. to Appeal
11	17	78	Mot for Extension of time to 12/11/78
12	11	78	Pet. for Rehearing
12	20	78	Order
12	20	78	Motion to strike Pet. Petition for rehearing
12	20	78	Order on Motion to Strike
12	20	78	Ext. for ext of time
12	20	78	Order on Ext of time
2	15	79	Pet. Habeas Corpus (See Orders - Motion to Strike granted)
	"		Final Judgment order, no relief requested - case is final

Month	Day	Year	
3	2	79	Petition for Rehearing of Order Striking "Petition for Rehearing & or/or Writ of Habeas Corpus
3	2	79	Exhibits 1 vol.
3	14	79	Order returning Pet for rehearing as filed improperly
5	7	79	Letter from US Supreme Court concerning writ of time to file writ of certiorari
10	8	79	Order from US Sup Ct denying Cert.
10	29	79	Letter from US Sup Ct advising rehearing was filed 10/23/79
11	28	79	Letter from US Sup Ct denying rehearing

12/15/75

Sarah Gaines
Clerk's Office, Supreme Ct
Called for 351—
w/send order.

J. Barker

David L. Hudgins Esq

23

55c

MC MD

81556

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1975

TUESDAY, DECEMBER 16, 1975

DAVID LIVINGSTON FINCHESS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

**

**

** CASE NO. 47,828

**

**

**

It is hereby ordered that the Parole and Probation Commission transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this cause.

WITNESS the Honorable James C. Adkins, Chief Justice of the Supreme Court of Florida, and the Seal of said Court at Tallahassee, the Capital, on this the 16th day of December, 1975.

Clerk of the Supreme Court of Florida.

cc: Honorable Paul M. Murchek
Honorable Louis G. Carres
Honorable Carolyn M. Snurkowski

December 18, 1975

The Honorable Sid J. White, Clerk
Supreme Court of Florida
Tallahassee, Florida

RE: David L. Funchess
v.
State of Florida
Case No. 47,823

Dear Mr. White:

With respect to the court's order of December 16, 1975, find attached the Commission's presentence investigation conducted in the case of the above-named.

Sincerely yours,

Harry T. Dodd
Administrative Assistant

HTD:kb

March 22, 1976

Honorable Sid White
Clerk of the Supreme Court
Supreme Court Building
Tallahassee, Florida 32304

Re: Douglas R. Meeks, #046346

Dear Mr. White:

Attached is a copy of the Psychological Screening Report on Mr. Meeks which you requested on March 22, 1976. This is the initial psychological done on Mr. Meeks. We do not have a psychiatric report in our file.

If we can be of further assistance, please let us know.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

Donald B. Jones
Deputy Director for Inmate Treatment

RBJ/pwb

Enclosure

March 31, 1975 Florida Division of Corrections – Reception and Medical Center

RMC-(C-17)

PSYCHOLOGICAL SCREENING REPORT

Name MEEKS, DOUGLAS, R. Number 046346 Age 21 Race Black

Offense First Degree Murder Sentence Death

Test MMPI, SCT, BGVT IQ 71-79 Intelligence Inferior

Education: (verified: yes __ no X) Grade Completed 11 College _____ (no. yrs.) Age _____

Reason for not completing education Went to Work

Literacy: Reading Level _____ Relative Grade _____

Vocation: (unverified) Fruit picker; plumbers helper

Present Interest Appeal

Special Difficulties Nature of sentence

PSYCHOLOGICAL OBSERVATIONS:

Subject's general attire appeared slightly below average. It was difficult to elicit spontaneous conversation from Meeks and most of his answers were extremely short. Subject possessed an optimistic attitude regarding his appeal and hoped to be back into the free world in a relatively short period of time. Discreet behavioral tremors were detected when discussing the crime which included leg shaking, hand wringing, and knuckle cracking. No delusional material, loose associations or hallucinatory imagery was elicited. He was well oriented as to time, place, and person and psychopathology was ruled out. His intellectual capacity, however, and ability to abstract as a result of that capacity was felt to be inferior. Rapport was felt to be genuine.

Meeks presents himself as a very inadequate and easily led individual. As indicated above his intellectual capacity is considered to be inferior and it seems as though he lacks ability to appropriately assess alternatives in a normal manner. Subject claimed during the interview to have been committed to the University of Jackson Mississippi Mental Ward in 1969 because he was considered to be aggressive by others in his community in Darling, Mississippi. He related a past juvenile aggressive background including overt aggressive acts toward his family when he was younger. His father died when subject was three and he was raised mainly by his mother. There are six other siblings in the family, three boys and three girls. Subject further related however that in the past four or five years he has not been as aggressive as he had prior to that time.

He reflects an unstable job history stating that when he was eighteen he left home to come South for fruit picking and once he arrived in Florida he held odd jobs such as working at a sawmill, plumbers helper, as well as the fruit picking business. His long range goals, if ever released to the free world again are to obtain a job as a plumbers helper, get married and raise a family.

RECOMMENDATIONS:

Meeks' institutional adjustment will most likely be determined by those peers whom he associates with. Meeks is the type of individual wo can easily be led into practically any type of activity and therefore, in light of the mileau at Florida State Prison, aggressive behaviors could certainly not be ruled out. His prognosis remains guarded.

CONFIDENTIAL
FOR PROFESSIONAL USE ONLY

J. A. Anderson, M. S.,
Psychologist

JAA:gp

Psychologist – General (FMC)

Best Copy Available

SID J. WHITE, CLERK
SUPREME COURT OF FLORIDA
SUPREME COURT BUILDING
TALLAHASSEE 32304

A046346

Ronald B. Jones, Deputy Director
Dept. of Offender Rehabilitation
1311 Winewood Blvd.
Tallahassee, Florida 32301

3/30/76

RE: DOUGLAS R. MEEKS
vs.
STATE OF FLORIDA

CASE NO. 47,533

Dear Sir:

I have this date received the below-listed pleadings or documents:

Psychological Screening Report

RECEIVED

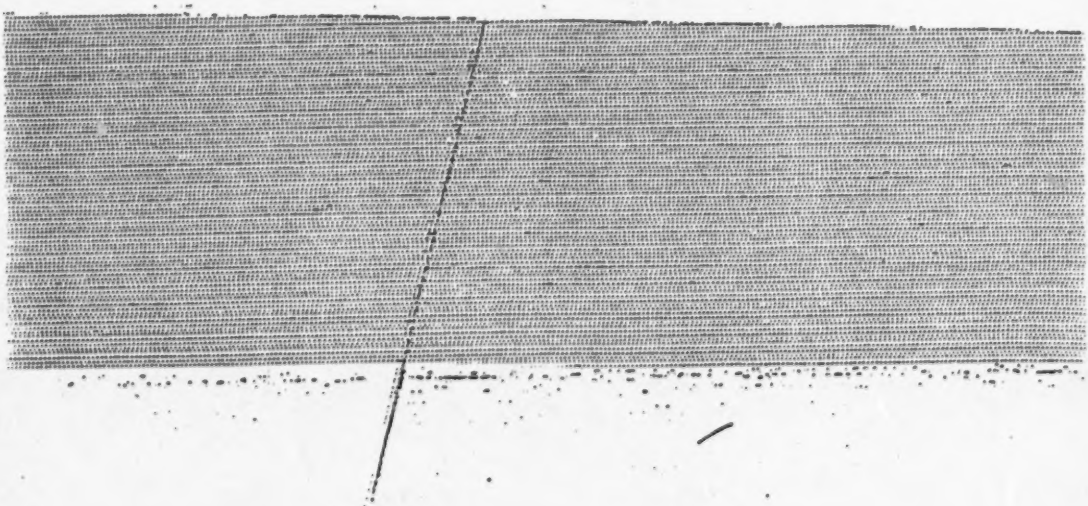
INMATE TREATMENT

Please make reference to the case number in all correspondence and pleadings.

Most cordially,

Clerk, Supreme Court

SJW/tsc



Best Copy Available

STYLE: Huckaby vs. State

CASE NO.: 47,736 DATE 3-26-76

RECEIPT IS ACKNOWLEDGED OF:

xxx: Psychological Report

- ☐ BRIEF
- ☐ CONFORMED TRANSCRIPT
- ☐ REQUEST FOR ORAL ARGUMENT
- ☐ PETITION FOR ATTORNEY'S FEES
- ☐ PETITION FOR REHEARING
- ☐ ORIGINAL RECORD/EXHIBITS
- ☐ PETITION FOR WRIT OF HABEAS CORPUS/MANDAMUS
- ☐ ORIGINAL WRIT WITH ACCEPTANCE OF SERVICE THEREON

LETTER OF

RESPONSE TO

COPY OF

SID J. WHITE, Clerk
Supreme Court of Florida

047571 Ben
&
044574 Glynn

29

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1976

WEDNESDAY, APRIL 14, 1976

182018

FRANZ PETER BUCKREM,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 48,029

It is hereby ordered that the Parole and Probation Commissior transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this cause.

WITNESS the Honorable Ben F. Overton, Chief Justice of the Supreme Court of Florida, and the Seal of said Court at Tallahassee, the Capital, on this the 14th day of April, 1976.

Clerk, Supreme Court of Florida

Honorable Paul M. Murchek
Honorable Gale K. Greene
Honorable Raymond L. Marky

STYLE: Franz Peter Buckrem vs. State

CASE NO.: 48,029 DATE 4-19-76

RECEIPT IS ACKNOWLEDGED OF:

xxxxxx Pre-Sentence Investigation

☐ BRIEF
☐ CONFORMED TRANSCRIPT
☐ REQUEST FOR ORAL ARGUMENT
☐ PETITION FOR ATTORNEY'S FEES
☐ PETITION FOR REHEARING
☐ ORIGINAL RECORD/EXHIBITS
☐ PETITION FOR WRIT OF HABEAS CORPUS/MANDAMUS
☐ ORIGINAL WRIT WITH ACCEPTANCE OF SERVICE THEREON

182018

LETTER OF

RESPONSE TO

COPY OF

SID J. WHITE, Clerk
Supreme Court of Florida

April 16, 1976

The Honorable Sid J. White, Clerk
Supreme Court of Florida
Tallahassee, Florida 32304

RE: Franz Peter Buckrem
vs.
State of Florida
Case No. 48,029

Dear Mr. White:

Pursuant to the order of the court dated April 14, 1976, please find attached a copy of the pre-sentence investigation conducted in the case of the above-named.

If I can be of any further assistance to the court, please advise.

Sincerely yours,

Harry T. Dodd
Administrative Assistant

HTD:kb

Enc.

STYLE: Franz Peter Buckrem vs. State File
CASE NO.: 48,029 DATE 4-15-76

RECEIPT IS ACKNOWLEDGED OF:
XXXX Psychological report 049061

- ☐ BRIEF
- ☐ CONFORMED TRANSCRIPT
- ☐ REQUEST FOR ORAL ARGUMENT
- ☐ PETITION FOR ATTORNEY'S FEES
- ☐ PETITION FOR REHEARING
- ☐ ORIGINAL RECORD/EXHIBITS
- ☐ PETITION FOR WRIT OF HABEAS CORPUS/MANDAMUS
- ☐ ORIGINAL WRIT WITH ACCEPTANCE OF SERVICE THEREON

LETTER OF _____
RESPONSE TO _____
COPY OF _____

SID J. WHITE, Clerk
Supreme Court of Florida

LOUIE L. WAINWRIGHT, SECRETARY

DEPARTMENT OF OFFENDER REHABILITATION

1311 Winewood Boulevard • Tallahassee, Florida 32301 • Telephone: 904-488-5021

Honorable Sid J. White
Clerk, Supreme Court
Supreme Court Building
Tallahassee, Fl. 32304

RE: Franz Peter Buckram 049061

In response to your telephone request of this date, please find enclosed a copy of our psychological report on Mr. Buckram.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

C. E. Stancil

Mr. C. E. Stancil
Inmate Records Supervisor

Enclosure

DOCUMENTATION OF TELEPHONE CONTACT

DATE:

CALLED:
CALLED BY: Judy / Office / Cen DISTRICT:
Suzanne C. SUBOFFICE:

RE: Glenn Starke Chambers CO#: 488-0125

SUMMARY OF CONVERSATION:

{7/11/75 Surrender}

Wanted BSI - W/send order

--

J Burleson

33

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1976

TUESDAY, MAY 11, 1976

153852

GLEN STARK CHAMBERS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 47,888

It is hereby ordered that the Parole and Probation Commission transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation (CO#153852) in this cause.

WITNESS the Honorable Ben F. Overton, Chief Justice of the Supreme Court of Florida, and the Seal of said Court at Tallahassee, the Capital, on this the 11th day of May, 1976.

Clerk of the Supreme Court of Florida.

May 18, 1976

The Honorable Sid J. White, Clerk
Supreme Court of Florida
Tallahassee, Florida 32304

RE: Case No. 47,888

Dear Mr. White:

Pursuant to the order of the court dated May 11, 1976, please find attached a copy of the presentence investigation conducted in this case.

If this writer can be of further assistance to the court, please advise.

Sincerely yours,

Harry T. Dodd
Administrative Assistant

HTD:kb

Enc.

35

May 18, 1976

Mr. Sid Johnston
Assistant Attorney General
Capital

RE: Glen Starke Chambers
CO#153852

Dear Mr. Johnston:

Pursuant to your telephone request of me on May 17, 1976, please find attached a copy of the presentence investigation conducted in the case of the above-named.

Another copy has been forwarded to the court pursuant to the court order dated May 11, 1976.

We would appreciate, of course, that the copy we are providing you be kept in confidence as much as possible as there is sensitive information contained in the report.

Sincerely yours,

Harry T. Dodd
Administrative Assistant

HTD:kb

Enc.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1976

THURSDAY, JUNE 3, 1976

RICHARD HENRY GIBSON,

Appellant,

vs. CASE NO. 48,698

STATE OF FLORIDA,

Appellee.

* * * * * * * * * * * * * * * * *

It is hereby ordered that the Parole and Probation Commission transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this cause.

WITNESS the Honorable Ben F. Overton, Chief Justice of the Supreme Court of Florida, and the Seal of Said Court at Tallahassee, the Capital, on this the 3rd day of June, 1976.

/s/ Sid J. White
Clerk, Supreme Court of Florida.

Hon. Paul M. Murchek
Hon. Louis G. Carres
Hon. Jeanne Dawes Schwartz

A True Copy

TEST:

By: Bernice L. Saunders
Chief Deputy Clerk
Sid J. White
Clerk, Supreme Court

TC

RECEIVED
JUN 14 1 37 PM '76
SUPREME COURT
TALLAHASSEE, FLORIDA

May 12, 1977

CONFIDENTIAL

Mr. Sid White, Clerk
Supreme Court
Supreme Court Building
Tallahassee, Florida 32304

RE: Richard Henry Gibson
CO-152388

Dear Mr. White:

Pursuant to telephone request from your office this date, enclosed please find a copy of the Presentence Investigation concerning the above-captioned individual for your confidential information.

We were advised that you had previously requested this report, however, we were unable to locate a copy of the Order and we would appreciate a copy for our file.

May we assure you of our cooperation in these matters.

Very truly yours,

Kenneth W. Simmons
Assistant Director

KWS:lt

Enclosure

38

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1976

MONDAY, JUNE 7,1976

178485 178486

ELWOOD CLARK BARCLAY and
JACOB JOHN DOUGAN, JR.,

Appellants,

vs. CASE NO. 47,260

STATE OF FLORIDA,

Appellee.

* *

It is hereby ordered that the Parole and Probation Commission transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigations (17-8485 and 17-8486) in this cause.

WITNESS the Honorable Ben F. Overton, Chief Justice of the Supreme Court of Florida, and the Seal of said Court at Tallahassee, the Capital, on this the 7th day of June, 1976.

Clerk, Supreme Court of Florida

Hon. Paul M. Murchek
Hon. Ernest D. Jackson, Sr.
Hon. Wallace E. Allbritton

File copy

June 11, 1976

Mr. Sid J. White, Clerk
Supreme Court of Florida
Tallahassee, Florida

RE: Elwood Clark Barclay, CO#178485
Jacob John Dougan, Jr., CO#178486

Dear Mr. White:

As per the Supreme Court's order of January 7, 1976, please find attached presentence investigations on the above-referenced subjects.

If we may be of further service to you, please do not hesitate to contact us.

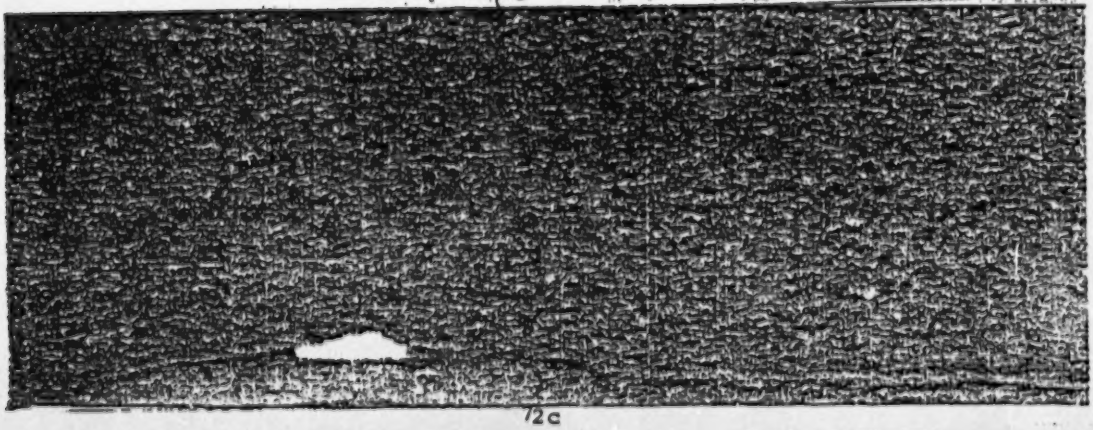
Sincerely yours,

Kenneth W. Simmons
Assistant Director

KWS:B:kb

Enc.

40



046621

SID J. WHITE, CLERK
SUPREME COURT OF FLORIDA
SUPREME COURT BUILDING
TALLAHASSEE 32304

File

DEPARTMENT OF OFFENDER REHAB
1311 Winewood Blvd.
Tallahassee, Florida 32301

June 8, 1976

RE: Psychological Screening Reports

Dear Sir:

I have this date received the below-listed pleadings or documents:

Psychological Screening Report in Elwood Barclay and Jacob John Dougan 046621 046622 vs. State

Psychological Screening Report in Monroe Holmes vs. State

Please make reference to the case number in all correspondence and pleadings.

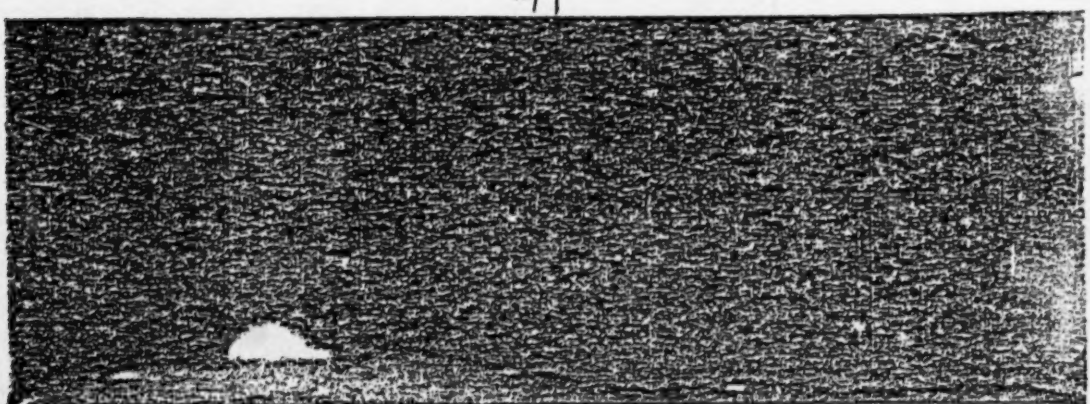
Most cordially,

Clerk, Supreme Court

SJW/jdw

SID J. WHITE
SUPREME COURT
TALLAHASSEE, FLA.

41



IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1976

MONDAY, JUNE 7,1976

17848 17848

ELWOOD CLARK BARCLAY and
JACOB JOHN DOUGAN, JR.,

Appellants,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 47,260

* *

It is hereby ordered that the Parole and Probation Commission transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigations (17-8485 and 17-8486) in this cause.

WITNESS the Honorable Ben F. Overton, Chief Justice of the Supreme Court of Florida, and the Seal of said Court at Tallahassee, the Capital, on this the 7th day of June, 1976.

Clerk, Supreme Court of Florida

Hon. Paul M. Murchek
Hon. Ernest D. Jackson, Sr.
Hon. Wallace E. Allbritton

June 11, 1976

Mr. Sid J. White, Clerk
Supreme Court of Florida
Tallahassee, Florida

RE: Elwood Clark Barclay, CO#178485
Jacob John Dougan, Jr., CO#178486

Dear Mr. White:

As per the Supreme Court's order of January 7, 1976, please find attached presentence investigations on the above-referenced subjects.

If we may be of further service to you, please do not hesitate to contact us.

Sincerely yours,

Kenneth W. Simmons
Assistant Director

KWS:B:kb

Enc.

SID J. WHITE, CLERK
SUPREME COURT OF FLORIDA
SUPREME COURT BUILDING
TALLAHASSEE 32304

File

DEPARTMENT OF OFFENDER REHAB
1311 Winewood Blvd.
Tallahassee, Florida 32301

June 8, 1976 046622

RE: Psychological Screening Reports

Dear Sir:

I have this date received the below-listed pleadings or documents:

Psychological Screening Report in Elwood Barclay and Jacob John Dougan vs. State 046621 046622

Psychological Screening Report in Monroe Holmes vs. State

Please make reference to the case number in all correspondence and pleadings.

Most cordially,

Clerk, Supreme Court

SJW/jdw

44

SID J. WHITE, CLERK
SUPREME COURT OF FLORIDA
SUPREME COURT BUILDING
TALLAHASSEE 32304

File

DEPARTMENT OF OFFENDER REHAB
1311 Winewood Blvd.
Tallahassee, Florida 32301

June 8, 1976 046622

RE: Psychological Screening Reports

Dear Sir:

I have this date received the below-listed pleadings or documents:

Psychological Screening Report in Elwood Barclay and Jacob John Dougan 046621 046622 vs. State

Psychological Screening Report in Monroe Holmes vs. State

Please make reference to the case number in all correspondence and pleadings.

Most cordially,

Clerk, Supreme Court

SJW/jdw

45

January 21, 1977

Honorable Sid J. White
Clerk, Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32304

Dear Mr. White:

RE: MARK MIKENAS
vs.
STATE OF FLORIDA

CASE NO. 49,928

Reference is made to your letter of January 17, 1977, in response to my motion for copy of presentence investigation report. In response to my motion, your letter says, "Moot, none prepared".

I am not urging the Court to consider the presentence investigation report, but I do note that it was on its own initiative, that the Court ordered the Parole and Probation Commission to produce the report. Thus, as an officer of the Court, I bring to your attention that there was, in fact, a presentence investigation report prepared in this case by an officer of the Florida Parole and Probation Office in Tampa. Indeed, in making his Findings of Fact, the trial judge considered the presentence investigation (Record, page 75, paragraph one).

If the report is transmitted to you as ordered by the Court, I request that consideration be given to my motion for a copy of the report.

Sincerely,

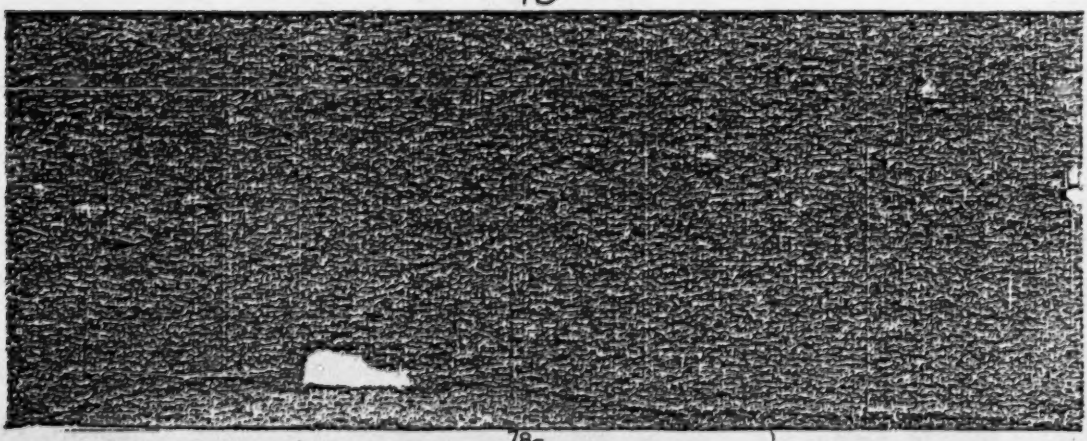
Robert W. Knight

RWK:rk

cc: Honorable Paul Murchek, Director,
Florida Parole and Probation Commission

Raymond L. Marky, Assistant Attorney General

46



February 14, 1977

Mr. Sid White
Clerk of the Supreme Court
Supreme Court Building
Tallahassee, Florida 32304

RE: MIKENAS, Mark CO# 194081
Case No. 49,928

Dear Mr. White:

Please refer to your request of January 24, 1977. We have now checked with the Tampa Office of the Department of Offender Rehabilitation and have learned that a presentence infestigation was prepared in this case however, was never sent to us.

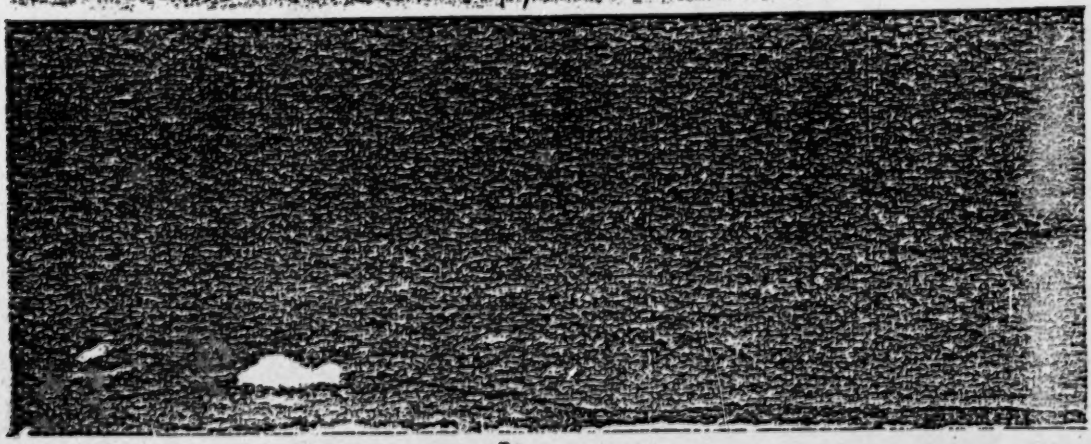
I am enclosing a copy of this investigation for your use and if we can be of further assistance to the court please do not hesitate to contact us.

Sincerely,

Kenneth W. Simmons
Assistant Director

KWS/B/pc

47



IN THE SUPREME COURT OF FLORIDA

THURSDAY, FEBRUARY 17, 1977

160437

RODNEY WAYNE MALLOY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 49,580

It is hereby ordered that the Parole and Probation Commission transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this cause.

WITNESS the Honorable Ben F. Overton, Chief Justice of the Supreme Court of Florida, and the Seal of said Court at Tallahassee, the Capital, on this seventeenth day of February, 1977.

Clerk of the Supreme Court of Florida

TC
cc: Honorable Paul Murchek
Attn.: Judy Burleson
Paul J. Martin, Esquire
Raymond L. Marky, Esquire

Supreme Court of Florida

Tallahassee 32304

SID J. WHITE
CLERK
BERNICE L. SAUNDERS
CHIEF DEPUTY CLERK

TELEPHONE:
904 - 488-0148

February 17, 1977

Mr. Ed Stancil, Director
Department of Offender Rehabilitation
1311 Winewood Boulevard
Tallahassee, Florida 32301

RE: RODNEY WAYNE MALLOY vs. STATE OF FLORIDA
Case No. 49,580

Dear Mr. Stancil:

This is to request a copy of the latest psychiatric evaluation made on the above named inmate who is on death row.

Most cordially,

Sid J. White
Clerk, Supreme Court

SJW/tsc

2-21

Feburary 22, 1977

Mr. Sid J. White
Clerk Supreme Court
Tallahassee, Florida 32304

F

Re Rodney Wayne Malloy 036108

Dear Mr. White

Your recent letter to Ed Stancil in which you requested a copy of the latest Psychiatric Evaluation on inmate Malloy has been forwarded to my office for further attention. I, in turn, am making your letter available to the staff at the Florida State Prison where inmate Malloy is located. I am confident that if any psychiatric documents are available they will make them available to your office.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

Phillip J. Walsh
Coordinator of Classification Services

PJW/jhb

cc Mr. Tom Bigham, Classification Supervisor
Florida State Prison
w/enclosure

February 24, 1977

The Honorable Sid J. White, Clerk
Supreme Court of Florida
Tallahassee, Florida

RE: MALLOY, Rodney Wayne
Case No. 49-580

Dear Mr. White:

Pursuant to the court's order of February 17, 1977, the Commission has conducted a search of the record in the case of the above-named. No presentence investigation report can be located regarding the conviction under appeal.

A check with the former Commission District Office in Bartow, Florida also fails to reveal that a presentence investigation was conducted in the case.

If the Commission can be of further assistance, please advise.

Sincerely,

Kenneth W. Simmons
Assistant Director

KWS/ED/pc

Free former

160437

STYLE: RODNEY WAYNE MALLOY vs. STATE

CASE NO.: 49,580 DATE 2/28/77

RECEIPT IS ACKNOWLEDGED OF:

☐ _____
☐ BRIEF
☐ CONFORMED TRANSCRIPT
☐ REQUEST FOR ORAL ARGUMENT
☐ PETITION FOR ATTORNEY'S FEES
☐ PETITION FOR REHEARING
☐ ORIGINAL RECORD/EXHIBITS
☐ PETITION FOR WRIT OF HABEAS CORPUS/MANDAMUS
☐ ORIGINAL WRIT WITH ACCEPTANCE OF SERVICE THEREON

LETTER OF February 24, 1977

RESPONSE TO _____

COPY OF _____

_____

SID J. WHITE, Clerk
Supreme Court of Florida

STYLE: RODNEY WAYNE MALLOY vs. STATE

CASE NO.: 49,580 A036108 DATE 2/25/77

RECEIPT IS ACKNOWLEDGED OF:

☐ _____
☐ BRIEF
☐ CONFORMED TRANSCRIPT
☐ REQUEST FOR ORAL ARGUMENT
☐ PETITION FOR ATTORNEY'S FEES
☐ PETITION FOR REHEARING
☐ ORIGINAL RECORD/EXHIBITS
☐ PETITION FOR WRIT OF HABEAS CORPUS/MANDAMUS
☐ ORIGINAL WRIT WITH ACCEPTANCE OF SERVICE THEREON

F

LETTER OF February 22, 1977

RESPONSE TO _____

COPY OF _____

_____

SID J. WHITE, Clerk
Supreme Court of Florida

IN THE SUPREME COURT OF FLORIDA

THURSDAY, APRIL 21, 1977

KWS
DeathBox

178289

JESSE RAYMOND RUTLEDGE,

Appellant,

vs. CASE NO. 48,801

STATE OF FLORIDA,

Appellee.

It is hereby ordered that the Parole and Probation Commission transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this cause.

WITNESS the Honorable Ben F. Overton, Chief Justice of the Supreme Court of Florida, and the Seal of said Court at Tallahassee, the Capital, on this the 21st day of April, 1977.

Clerk of the Supreme Court of Florida

RECEIVED
APR 26 8 07 AM '77
FLORIDA PROBATION AND PAROLE COMMISSION
TALLAHASSEE, FLORIDA

R

CC: Hon. Paul M. Murchek
Attn.: Judy Burleson
Hon. Peter F. Laird
Hon. Wallace E. Allbritton

April 21, 1977

Mr. Ed Stancil, Director
Dept. of Offender Rehabilitation
1311 Winewood Boulevard
Tallahassee, Florida 32301

Re: Jesse Raymond Rutledge
vs.
State of Florida
Case No. 48,801

Dear Mr. Stancil:

This is to request a copy of the latest psychiatric evaluation made on the above named inmate who is on death row.

Most cordially,

Sid J. White
Clerk, Supreme Court

SJW:elr

Best Copy Available

May 5, 1977

Honorable Sid White
Clerk, Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32304

RE: Jessie Raymond Rutledge, CO# 178289

Dear Clerk White:

Please refer to your order dated April 21, 1977, in reference to the above individual. Please be advised that our records reflect that the individual was sentenced on December 31, 1975, in the circuit of Alachua County to death. We do not have a pre-sentence investigation in this case and a check with the Department of Offender Rehabilitation's District Office in Gainesville reflects that there was not a pre-sentence investigation done in this case.

If we can be of any other assistance, please advise.

Sincerely,

Kenneth W. Simmons
Assistant Director

KWS:lh

DOCUMENTATION OF TELEPHONE CONTACT

DATE: 4/25/77

CALLED:
CALLED BY:

DISTRICT:
SUBOFFICE: 11-7532

RE: FRED LYMAN BRUMBLEY CO#: 165106

SUMMARY OF CONVERSATION:

SUBJECT IS ONE OF THOSE CASES WHERE LOOSE MAIL WAS BEING HELD IN RECORDS INSTEAD OF BEING PUT WITH FILE.

SUBJECT WAS NOT SCHEDULED FOR FINAL REV. HRG. BECAUSE WE DID NOT KNOW ABOUT DISPOSITION. UNTIL 4/19/77.

SUBJECT WILL NOW BE SET UP FOR A REV. HRG.

J Stokesberry

56

88c

IN THE SUPREME COURT OF FLORIDA

THURSDAY, SEPTEMBER 13, 1979

FRED LYMAN BRUMBLEY,	**	
Appellant,	**	
v.	**	CASE NO. 56,006
STATE OF FLORIDA,	**	
Appellee.	**	

** ** ** ** ** ** ** ** ** *

It is hereby ordered that the Division of Corrections transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this cause.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

cc: Hon. Louie Wainwright
Carl S. McGinnes, Esquire
Richard W. Prospect, Esquire

SEP 21 6 21 PM '79

September 19, 1979

Honorable Sid J. White
Clerk, Supreme Court
Supreme Court Building
Tallahassee, Florida 32304

Re: Fred Lyman Brumbley, #038346

Dear Mr. White:

Pursuant to your court order dated September 13, 1979, attached you will find a copy of the pre-sentence investigations on the above referenced subject.

If we may be of further assistance, please advise.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

Louis H. Carmichael
Chief, Bureau of Offender Records

LHC/db

Attachments

DEPARTMENT OF OFFENDER REHABILITATION

REGION II

COMMUNITY SERVICES DISTRICT-24

Post Office Box 540 Perry, Florida 32347 Telephone: 904-584-3448

September 26, 1979

Mr. D. H. Brierton
Superintendent
Florida State Prison
P. O. Box 747
Starke, Florida 32091

Attention: Mr. Tom Bigham, Jr.
Classification Supervisor II

Re: Brumbley, Fred
Number: 38846

Dear Mr. Brierton:

Please be advised that we do not have a file on the above subject, and a Presentence Investigation was not requested by the Court at the time of sentencing.

Sincerely,

Robert K. Isbell
District Supervisor

RKI:ph

Ckld. 5-12-77

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, MAY 11, 1977

JOSEPH GREEN BROWN,

Appellant,

vs. CASE NO. 46,925

STATE OF FLORIDA,

Appellee.

* * * * * * * * * * * * * * * * *

It is hereby ordered that the Parole and Probation Commission transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this cause.

WITNESS the Honorable Ben F. Overton, Chief Justice of the Supreme Court of Florida, and the Seal of said Court at Tallahassee, the Capital, on this the 11th day of May, 1977.

Bernice L. Saunders
Chief Deputy Clerk, Supreme Court of Fla.

W
CC: Honorable Paul M. Murchek
Attn.: Carolyn Snurkowski
Honorable J. Michael Shea
Hon. Charles W. Musgrove

IMMEDIATE ATTENTION Teresa

Supreme Court of Florida

Tallahassee 32304

SID J. WHITE
CLERK
BERNICE L. SAUNDERS
CHIEF DEPUTY CLERK

TELEPHONE:
904-488-0230

May 11, 1977

Mr. Ed Stancil, Director
Department of Offender Rehabilitation
1311 Winewood Blvd.
Tallahassee, Florida 32301

#042546

RE: Joseph Green Brown v. State of Florida
Case No. 46,925

Dear Mr. Stancil:

This is to request a copy of the latest psychiatric evaluation made on the above named inmate who is on death row.

Most cordially,

Bernice L. Saunders

Bernice L. Saunders
Chief Deputy Clerk, Supreme Court

BLS/jdw

sent reports 5-13-77
lk.

May 16, 1977

Mr. Sid J. White, Clerk
Supreme Court of Florida
Tallahassee, Florida

Re: Joseph Green Brown
CM# 172407
PM# 042546

Pursuant to the Court's Order of May 11, 1977, in case #46-925, the Commission has conducted a search of its records to determine if a pre-sentence investigation was conducted.

The Commission's records do not reflect that a pre-sentence investigation was conducted in Hillsborough County Circuit Court, case #73-2130-C. The Commission did conduct a pre-sentence investigation in Hillsborough County Circuit Court, case #73-1333-C, which charged Robbery and was not related to First Degree Murder.

If this Commission can be of further assistance to the Court, please advise.

Sincerely,

Harry T. Dodd
Parole Agent Supervisor

HTD/ca

Supreme Court of Florida
Tallahassee 32301

SID J. WHITE
CLERK
BERNICE L. SAUNDERS
CHIEF DEPUTY CLERK

TELEPHONE
904 - 488-0125

August 4, 1977

Mr. Ed Stancil, Director
Dept. of Offender Rehabilitation
1311 Winewood Boulevard
Tallahassee, Florida 32301

Re: Robert Fieldmore Lewis
vs.
State of Florida
Case No. 50,851

Dear Mr. Stancil:

This is to request a copy of the latest psychiatric evaluation made on the above named inmate who is on death row.

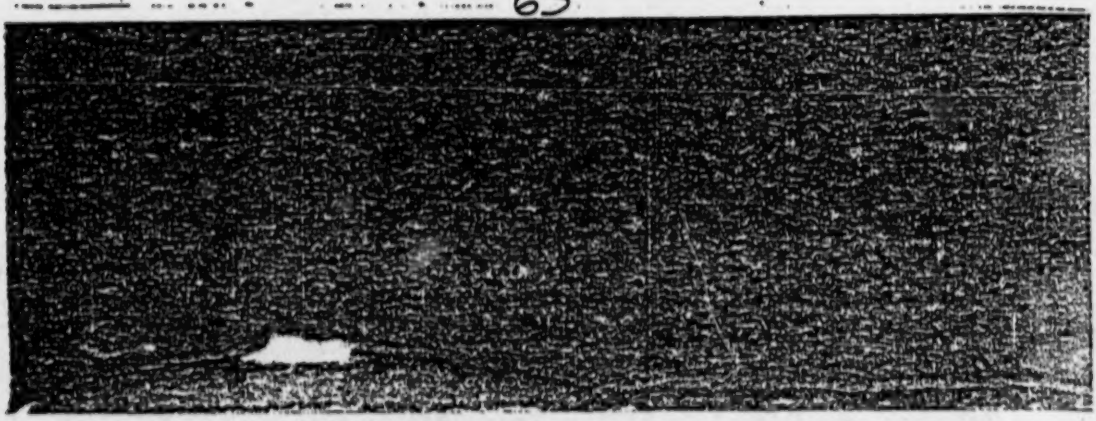
Most cordially,

Sid J. White
Clerk, Supreme Court

By: Emily L. Rhodes
Deputy Clerk

SJW:elr

63



DEPARTMENT OF OFFENDER REHABILITATION

1311 Winewood Boulevard • Tallahassee, Florida 32301 • Telephone: 904-488-3021

FLORIDA STATE PRISON

Post Office Box 747 • Starke, Florida 32091 • Telephone: 904-964-8125

August 22, 1977

Mr. Edward Alford
Inmate Records Supervisor
Department of Offender Rehabilitation
1311 Winewood Blvd.
Tallahassee, Florida 32301

RE: Lewis, Robert #A-032695

Dear Mr. Alford:

In response to your requested evaluation of the above named subject has been currently suspended. Upon receiving a phone call from the subject's counselor, Mr. Ted Mack, Assistant Public Defender, Tallahassee, Florida, and subsequent to three consecutive refusals of appointment by the subject this action is necessary.

Mr. Mack advised his client not to submit to evaluation by this or any other office in Florida State Prison. Mr. Mack informed me of this advice this date.

If I can be of any further help, please do not hestitate to call.

Sincerely,

D. H. BRIERTON, SUPERINTENDENT

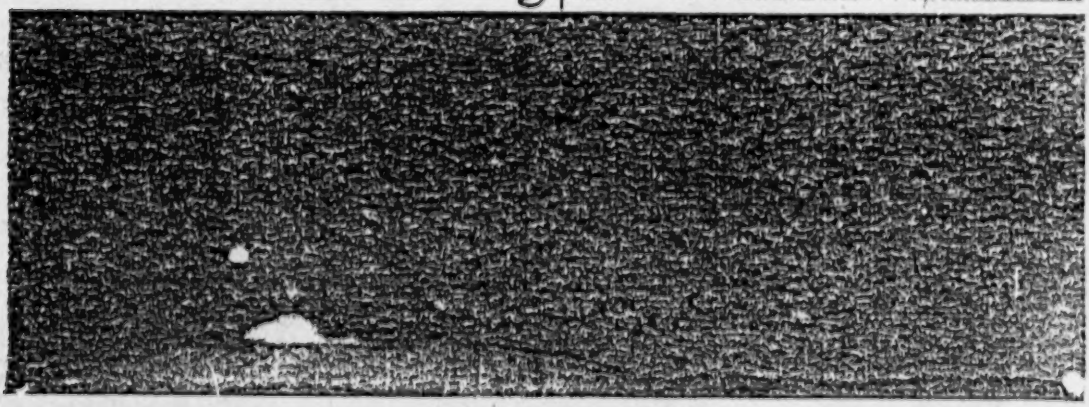
Paul C. Decker

Paul C. Decker
Psychologist

PCD:lr

cc: File

64



file

August 24, 1977

Mr. Ted Mack
Assistant Public Defender
P. O. Box 671
Tallahassee, Florida 32302

RE: Robert Fieldmare Lewis, #032695

Dear Mr. Mack:

Enclosed is a copy of the letter from Mr. Sid J. White, Clerk, Supreme Court of Florida in which the court has requested a copy of the latest psychiatric evaluation on Mr. Lewis.

Please be assured of our cooperation in such matters.

Sincerely,

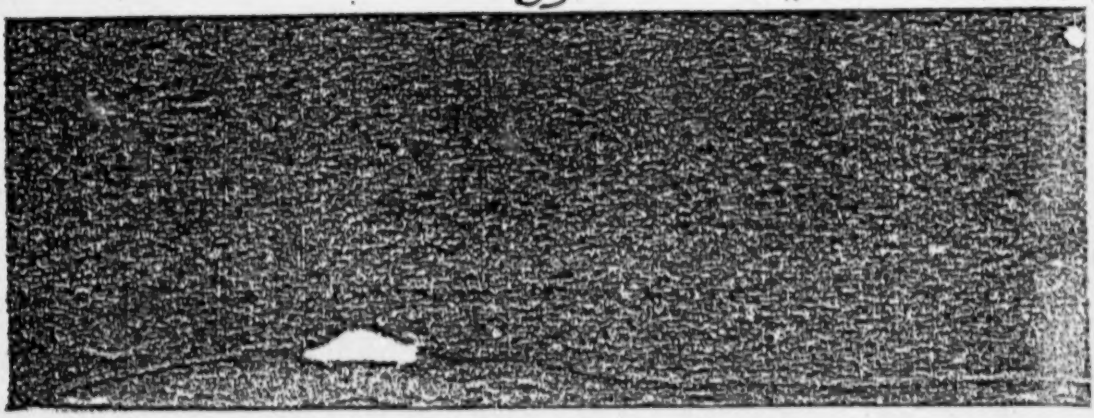
LOUIE L. WAINWRIGHT, SECRETARY

Louis H. Carmichael, Chief
Bureau of Offender Records

LHC/eas

Enclosure

65



August 26, 1977

Mr. Sid J. White, Clerk
Supreme Court of Florida
Tallahassee, Florida 32304

RE: Robert Fieldmore Lewis, #A032695
VS. State of Florida, Case #50,851

Dear Mr. White:

This is in response to your request for a copy of the Psychiatric evaluation on the above named subject.

I am sorry not to have responded to your request sooner, but complications has arisen concerning this request.

Upon reviewing Mr. Lewis' Institutional File, it was learned that no recent Psychiatric Evaluation was available so an appointment was scheduled for an evaluation to be completed. Mr. Lewis, after consulting with his legal council, has refused to cooperate in the preparation of this evaluation.

Upon his receipt into our custody, a Psychological Screening Report was prepared on Mr. Lewis. Our Institutional Psychologist is preparing a review and up-date to this report which will be forwarded to your office as soon as it is completed. Meanwhile, I am attaching a copy of the original report for your use.

I trust this information will be of use to you. If we can further assist in this case, please advise.

Sincerely,

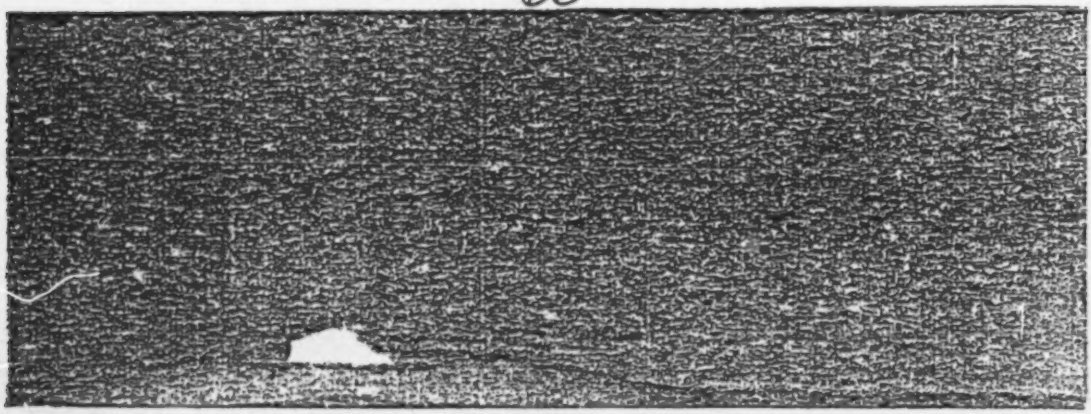
LOUIE L. WAINWRIGHT, SECRETARY

Louis H. Carmichael, Chief
Bureau of Offender Records

LHC/eas

Attachment

66



File

September 7, 1977

Mr. Sid J. White, Clerk
Supreme Court of Florida
Tallahassee, Florida 32304

Re: Lewis, Robert Fieldmore, #A032695

Dear Mr. White:

In follow-up to your request for a copy of the above named inmate's psychiatric evaluation, I am forwarding the latest correspondence from the Institutional Psychologist which is self-explanatory.

If I may be of further assistance in this matter, please advise.

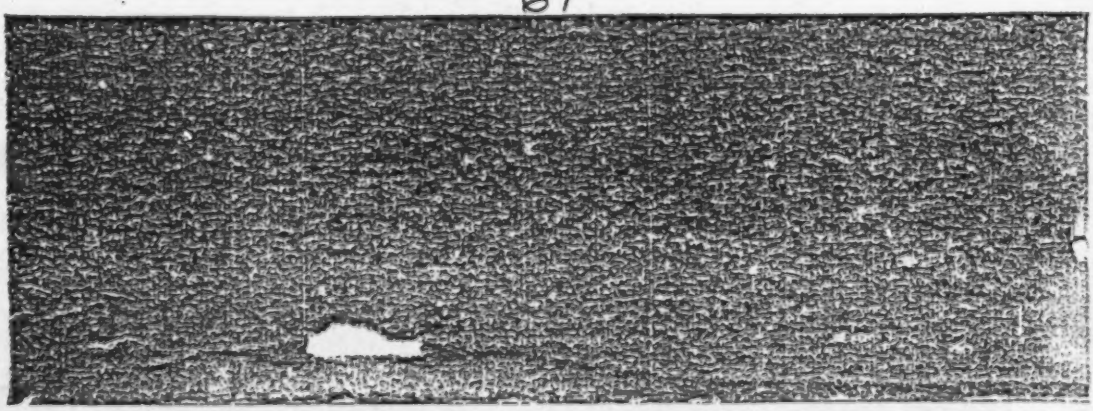
Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

Louis H. Carmichael
Chief, Bureau of Offender Records

LHC/eag

67



SID J. WHITE, CLERK
SUPREME COURT OF FLORIDA
SUPREME COURT BUILDING
TALLAHASSEE 32304

Louis H. Carmichael
Chief, Bureau of
Offender Records
Dept. of Offender Rehabilitation
1311 Winewood Boulevard
Tallahassee, Florida 32301

September 8, 1977

Robert Fieldmore Lewis,
vs.
State of Florida

Case No. 50,851

Dear Sir:

I have this date received the below-listed pleadings or documents:

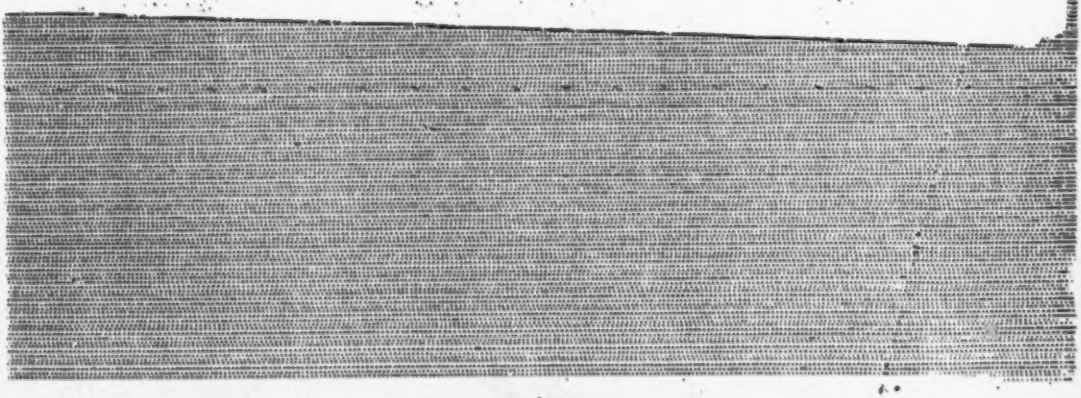
Your letter of September 7, 1977, with copy of Paul C. Decker's letter of August 22, 1977, to Edward Alford.

Please make reference to the case number in all correspondence and pleadings.

Most cordially,

SJW:elr

Clerk, Supreme Court



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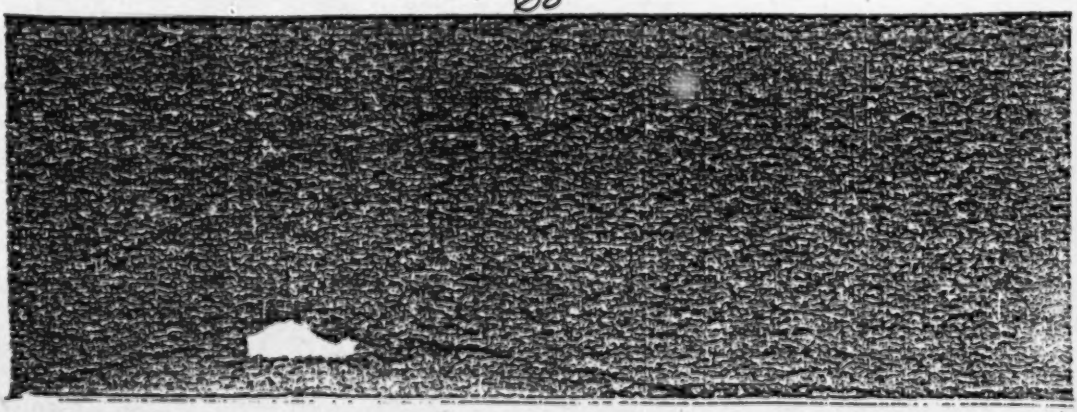


Supreme Court of Florida

Tallahassee 32304

SID J. WHITE
CLERK
BERNICE L. SAUNDERS
CHIEF DEPUTY CLERK

October 5, 1977

TELEPHONE:
[redacted]
904 • 488-0125

Mr. Ed Stancil, Director
Dept. of Offender Rehabilitation
1311 Winewood Boulevard
Tallahassee, Florida 32301

Re: Jesse Lamar Hall, vs.
State of Florida
Case Nos. 49,566 & 49,567

Dear Mr. Stancil:

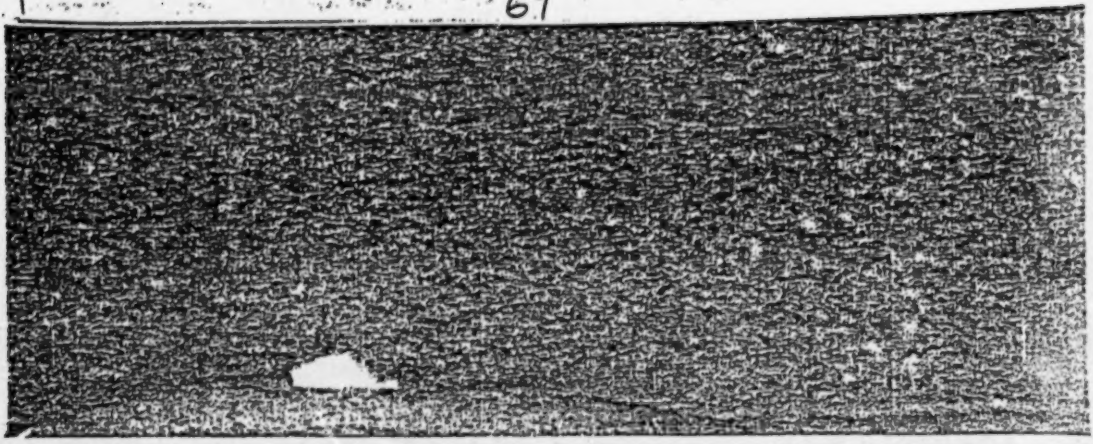
This is to request a copy of the latest psychiatric evaluation made on the above named inmate who is on death row.

Most cordially,

Sid J. White
Clerk, Supreme Court

SJW:elr

69



October 24, 1977

Sid J. White
Clerk, Supreme Court of Florida
Tallahassee, Florida 32304

Re: Jesse Lamar Hall, vs. State of Florida
Case Nos. 49,566 & 49567
DOR #053055

Dear Mr. White:

This is in response to your request for a copy of the latest Psychiatric Evaluation on the above referenced inmate.

No Psychiatric Evaluation has been completed on Mr. Hall, however, I am enclosing a copy of the Psychological Screening Report prepared when he was admitted to our custody.

I trust this information will sufficiently meet your needs in this case.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

E.L. Alford
Acting Inmate Records Supervisor

ELA:sp

Enclosure

Best Copy Available

STYLE: Jesse Lamar Hall vs. State of Florida

CASE NO.: 49,566 & 49,567 DATE: Oct. 27, 1977

RECEIPT IS ACKNOWLEDGED OF: (DOR #053055)

File

- ☐ BRIEF
- ☐ CONFORMED TRANSCRIPT
- ☐ REQUEST FOR ORAL ARGUMENT
- ☐ PETITION FOR ATTORNEY'S FEES
- ☐ PETITION FOR REHEARING
- ☐ ORIGINAL RECORD/EXHIBITS
- ☐ PETITION FOR WRIT OF HABEAS CORPUS/MANDAMUS
- ☐ ORIGINAL WRIT WITH ACCEPTANCE OF SERVICE THEREON

LETTER OF October 24, 1977, with Psychological

RESPONSE TO: Screening Report.

COPY OF:

SID J. WHITE, Clerk
Supreme Court of Florida

Supreme Court of Florida

Tallahassee 32301

SID J. WHITE
CLERK
BERNICE L. SAUNDERS
CHIEF DEPUTY CLERK

October 5, 1977

TELEPHONE:
904 • 488-0125

Mr. Ed Stancil, Director
Dept. of Offender Rehabilitation
1311 Winewood Boulevard
Tallahassee, Florida 32301

Re: Enoch Lewis, Jr., vs. State of Florida
Case No. 49,668

Dear Mr. Stancil:

This is to request a copy of the latest psychiatric evaluation made on the above named inmate who is on death row.

Most cordially,

Sid J. White
Clerk, Supreme Court

SJW:elr

October 24, 1977

Sid J. White
Clerk, Supreme Court of Florida
Tallahassee, Florida 32304

Re: Enoch Lewis, Jr., vs. State of Florida
Case No. 49668
DOR #053056

Dear Mr. White:

This is in response to your request for a copy of the latest Psychiatric Evaluation on the above referenced individual.

No Psychiatric Evaluation has been completed on Mr. Lewis, however, I am enclosing a copy of the psychological screening report prepared when he was admitted to our custody.

I trust this information will sufficiently meet your need in this case.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

E.L. Alford
Acting Inmate Records Supervisor

ELA:sp

Enclosure

Supreme Court of Florida

Tallahassee 32304

SID J. WHITE
CLERK
BERNICE L. SAUNDERS
CHIEF DEPUTY CLERK

October 5, 1977

TELEPHONE
904 • 488-0125

Mr. Ed Stancil, Director
Dept. of Offender Rehabilitation
1311 Winewood Boulevard
Tallahassee, Florida 32301

Re: Harold Gene Lucas, vs.
State of Florida
Case No. 51,135

Dear Mr. Stancil:

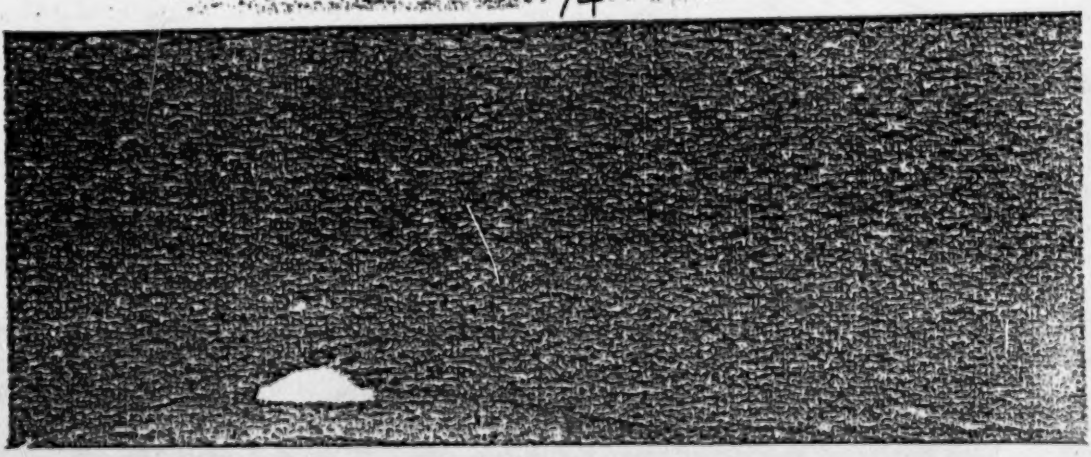
This is to request a copy of the latest psychiatric evaluation made on the above named inmate who is on death row.

Most cordially,

Sid J. White
Clerk Supreme Court

SJW:elr

74



October 24, 1977

Sid J. White
Clerk, Supreme Court
Tallahassee, Florida 32304

Re: Harold Gene Lucas, vs. State of Florida
Case No. 51,135
DOR #056279

Dear Mr. White:

This is in response to your request for a copy of the latest Psychiatric Evaluation on the above referenced inmate.

No Psychiatric Evaluation has been completed on Mr. Lucas, however, I am enclosing a copy of the psychological screening report prepared when he was admitted to our custody.

I trust this information will sufficiently meet your need in this case.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

T.L. Alford
Acting Inmate Records Supervisor

TLA:sp

Enclosure

BAD COPY

75

Supreme Court of Florida

Tallahassee 32304

SID J. WHITE
CLERK
BERNICE L. SAUNDERS
CHIEF DEPUTY CLERK

TELEPHONE:
[redacted]
904 • 488-0125

October 25, 1977

Mr. Ed Stancil, Director
Department of Offender Rehabilitation
1311 Winewood Blvd.
Tallahassee, Florida 32301

056787

RE: Derrick MO'Mey Manning vs. State of Florida
Case No. 51,098

Dear Mr. Stancil:

This is to request a copy of the latest psychiatric evaluation made on the above named inmate who is on death row.

Most cordially,

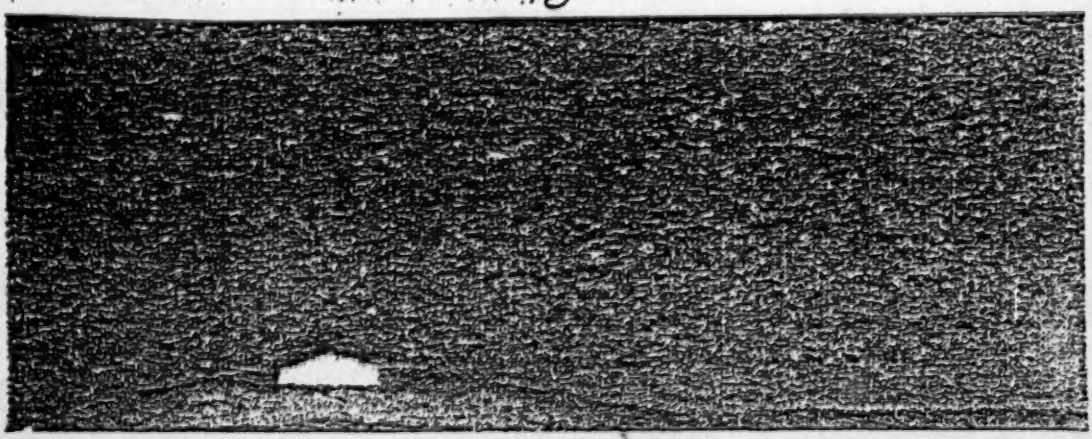
Sid J. White
Clerk, Supreme Court

SJW/slw

RECEIVED
NOV 02 1977
SUPERINTENDENT'S OFFICE

RECEIVED
NOV 10
[illegible]

76



file
056787

November 18, 1977

Mr. Sid J. White
Clerk, Supreme Court
Supreme Court of Florida
Tallahassee, Florida 32304

Re: Derrick No'Mey Manning vs. State of Florida
Case # 51,098 CCRs #056787

Dear Mr. White:

Pursuant to your request of October 25, 1977, I am enclosing a copy of psychiatric evaluation prepared on the above referenced inmate.

Please be assured of our cooperation in such matters.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

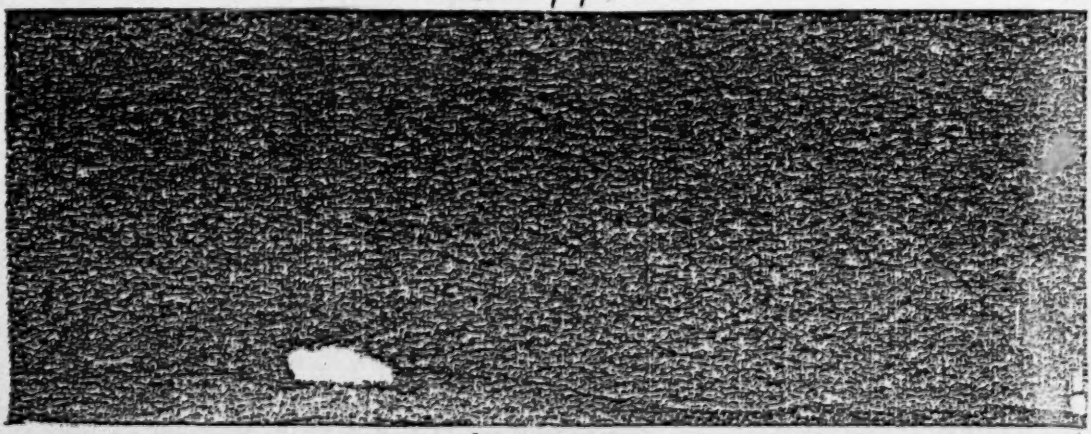
E. L. Alford
Acting Inmate Records Supervisor

ELA/bdg

Attachment

Best Copy Available

77



Supreme Court of Florida

Tallahassee 32304

SID J. WHITE
CLERK
BERNICE L. SAUNDERS
CHIEF DEPUTY CLERK

November 23, 1977

TELEPHONE:
[redacted]
904 • 488-0125

Mr. Ed Stancil, Director
Dept. of Offender Rehabilitation
1311 Winewood Boulevard
Tallahassee, Florida 32301

Re: Arthur F. Goode, III
vs. State of Florida
Case No. 51,480

Dear Mr. Stancil:

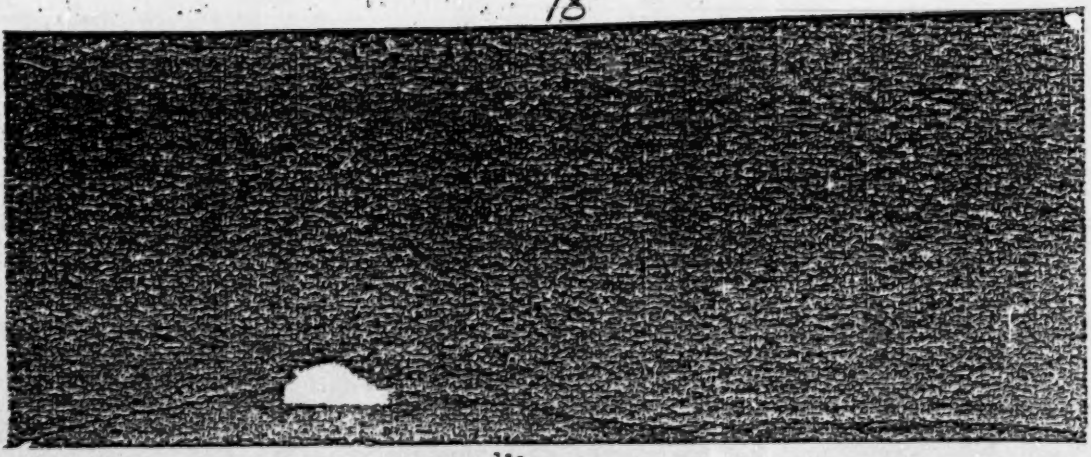
This is to request a copy of the latest psychiatric evaluation made on the above named inmate who is on death row.

Most cordially,

Sid J. White
Clerk, Supreme Court

SJW:elr

78



Best Copy Available

December 7, 1977

Mr. Sid J. White, Clerk
Supreme Court of Florida
Tallahassee, Florida 32304

RE: GOODE, ARTHUR F. #056781

Dear Mr. White:

Your recent letter to Ed Stancil has been forwarded to my office for attention. Enclosed you will find copies of the psychological screening report and psychiatric contact note on the above named inmate. Pursuant to your request, I am forwarding this information to your office. Please be advised that these are the only psychiatric reports we have on file at the present time.

If I can be of further assistance in this matter, feel free to contact my office at any time.

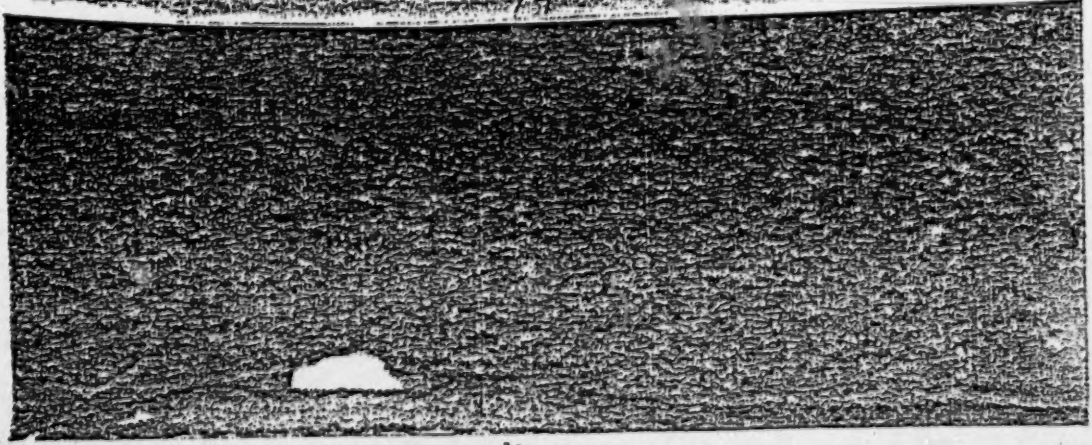
Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

E.A. Sobach
Acting Inmate Records Supervisor

EAS:sp

Enclosure



January 20, 1978

Mr. Sid White
Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida

Re: Carl Ray Songer
Case # 52-642
PR# 041036
CO# 169436

Dear Mr. White:

This is in reference to your communication of December 21, 1977, with reference to the above captioned individual, wherein you asked for a copy of the pre-sentence investigation in this case.

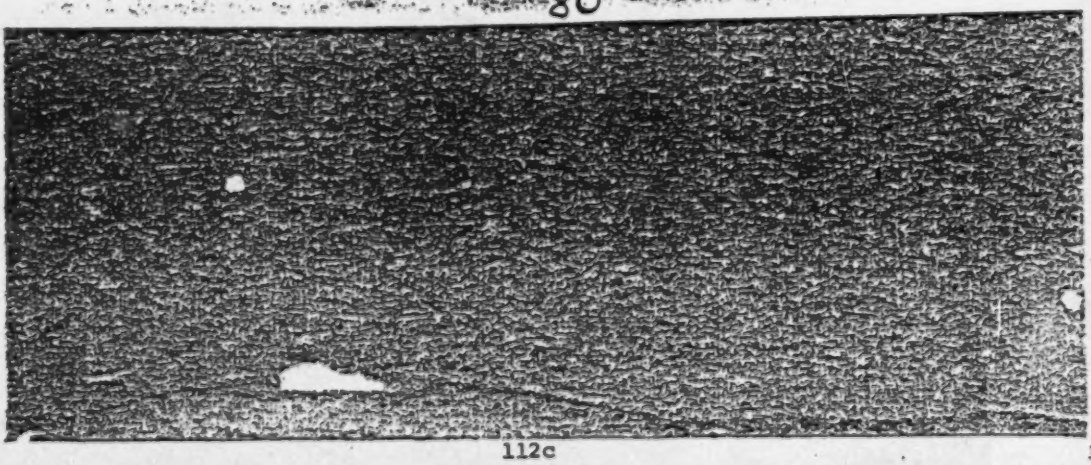
Be advised that no pre-sentence investigation was ever completed on this case, however, a post sentence investigation was completed and I am enclosing this and hope that it will be of use to you in this matter.

Very truly yours,

Kenneth W. Simmons
Deputy Director

KWS/Scs

enclosure: post sentence investigation



Supreme Court of Florida

Tallahassee 32301

SID J. WHITE
CLERK
BERNICE L. SMILGIN
CHIEF DEPUTY CLERK

TELEPHONE:
904-488-0125

May 9, 1978

Honorable Kenneth W. Simmons
Deputy Director
Florida Parole and Probation Commission
P. O. Box 3168
Tallahassee, Florida 32303

Re: Carl Ray Songer vs. State of Florida
Supreme Court Case No. 52,642

Dear Mr. Simmons:

At the direction of the Court, the post-sentence investigation is returned herewith. We should not have anything in the Court file that was done subsequent to the sentencing.

Thank you for your kind cooperation.

Most cordially,

Sid J. White
Clerk, Supreme Court.

SJW:sg
Enclosure

January 28, 1978

033647.

Sid J. White, Clerk
Supreme Court of Florida
Tallahassee, Florida 32304

RE: Thomas, Daniel H.
#A1033647

Dear Mr. White:

I have received your recent correspondence requesting the latest phychiatric evaluation made on the above referenced individual who is presently on Death Row. I have checked our files here in Central Office and it appears that his latest admission summery has not been received here in Tallahassee to date. Therefore, I have requested the institution to forward a copy of the latest phychiatric information directly to you and have been assured that it will go our in the mail this day.

We are assuring you of all cooperation in these matters.

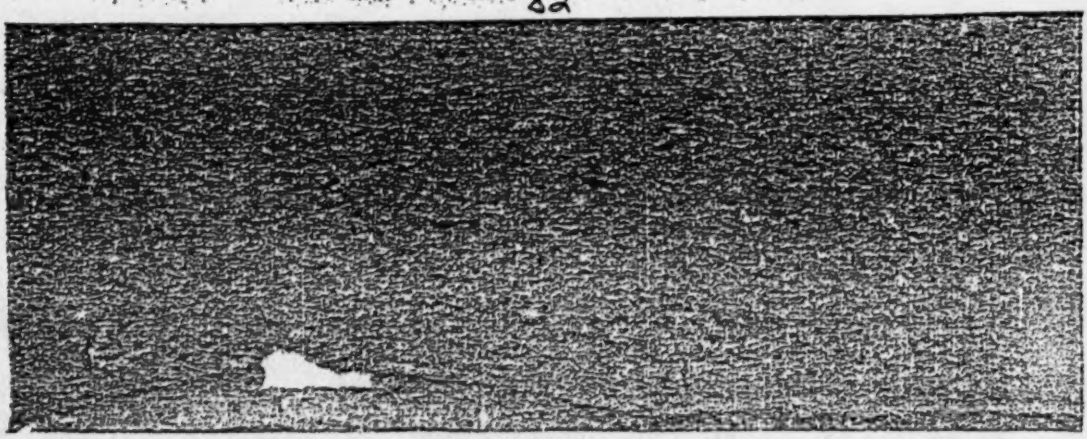
Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

E.A. Sobach
Acting Inmate Records Supervisor

EAS/pr

82



Supreme Court of Florida

Tallahassee 32301

SID J. WHITE
CLERK
BERNICE L. SMILGIN
CHIEF DEPUTY CLERK

TELEPHONE:
904-488-0125

January 31, 1978

Mr. Ed Stancil, Director
Dept. of Offender Rehabilitation
1311 Winewood Boulevard
Tallahassee, Florida 32301

Re: Jon Steven Miller a/k/a
Robert Christopher, vs.
State of Florida
Case No. 50,606

Dear Mr. Stancil:

This is to request a copy of the latest psychiatric evaluation made on the above named inmate who is on death row.

Most cordially,

Sid J. White
Clerk, Supreme Court

SJW:elr

February 7, 1978

Mr. Sid White
Clerk
Supreme Court Building
Tallahassee, Florida

Re: Jon Steven Miller AKA Robert Christopher
PR# 041384, CO# 170151

Dear Mr. White:

Please find attached a post sentence investigation which was done on the above captioned individual.

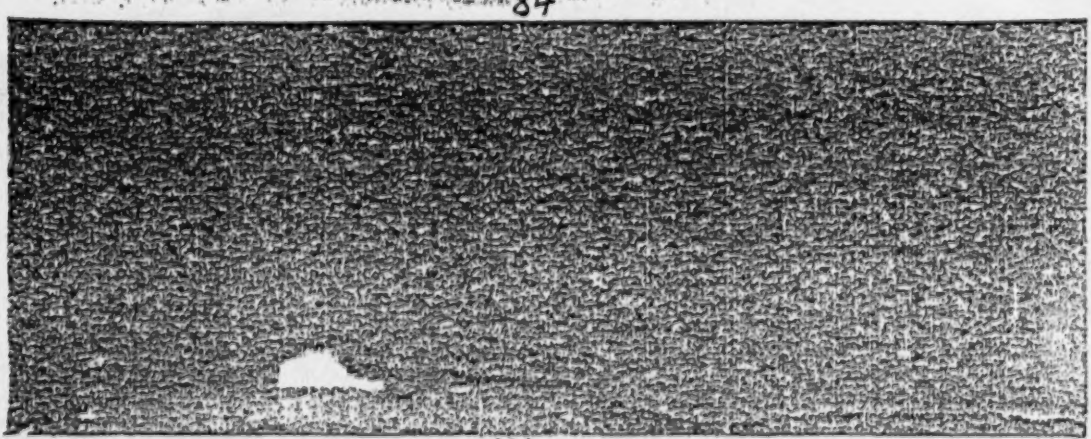
I hope this will be of help to you in this matter. If further information is needed, please do not hesitate to contact this office.

Sincerely,

Kenneth W. Simmons
Deputy Director

KWS/Sca

84



February 8, 1978

Sid J. White, Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32304

RE: Jon Steven Miller #041354

Dear Mr. White:

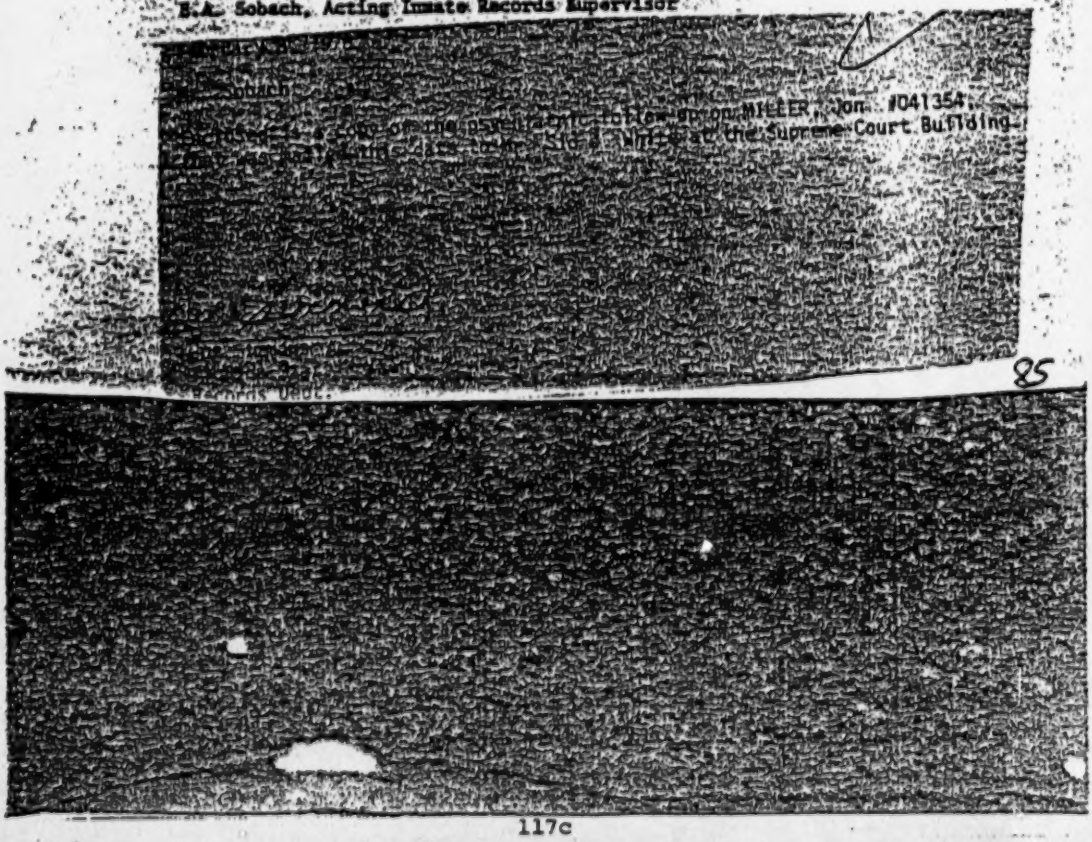
Enclosed is the latest psychiatric evaluation completed on the above referenced individual which you requested that I forward to your attention. Additionally, I have requested that the institution forward a copy of the psychological follow-up completed on Mr. Miller on December 27, 1978. Please be advised that this is the latest psychiatric information which we have available in our files.

Assuring you of our continued cooperation in these matters.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

B.A. Sobach, Acting Inmate Records Supervisor



Supreme Court of Florida

Tallahassee 32304

SID J. WHITE
CLERK
BERNICE L. SMILGIN
CHIEF DEPUTY CLERK

TELEPHONE:
904-488-0125

February 10, 1978

4

Mr. Ed. Stancil, Director
Dept. of Offender Rehabilitation
1311 Winewood Boulevard
Tallahassee, Florida 32301

Re: Bobby Marion Francis,
vs. State of Florida
Case No. 50,127

Dear Mr. Stancil:

This is to request a copy of the latest psychiatric evaluation made on the above named inmate who is on death row.

Most cordially,

Sid J. White
Clerk, Supreme Court

SJW:elr

86

RECEIVED
AUG 27 1980
PUBLIC DEFENDER
2nd JUDICIAL CIRCUIT

February 16, 1973

Sid J. White, Clerk
Supreme Court Building
Office of the Clerk
Supreme Court of Florida
Tallahassee, Fla. 32304

Re: Francis, Bobby Marion #B-000057 Case #37-127

Dear Mr. White:

Enclosed is the latest psychiatric report available on the above referenced individual. Because there is not a more recent evaluation available, I have requested the staff at Florida State Prison to complete an updated psychological evaluation and forward it to my office. This report should be available in the very near future.

Assuring you of our continued cooperation in these matters.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

E.A. Sobach, Acting Inmate Records Supervisor

Enclosure

EAS/pr

87

STYLE: BOBBY MARION FRANCIS vs. STATE OF FLORIDA

CASE NO.: 50,127 DATE: 2-23-78

RECEIPT IS ACKNOWLEDGED OF:

Psychological Evaluation

BRIEF
CONFORMED TRANSCRIPT
REQUEST FOR ORAL ARGUMENT
PETITION FOR ATTORNEY'S FEES
PETITION FOR REHEARING
ORIGINAL RECORD/EXHIBITS
PETITION FOR WRIT OF HABEAS CORPUS/MANDAMUS
ORIGINAL WRIT WITH ACCEPTANCE OF SERVICE THEREON

009759

LETTER OF

RESPONSE TO

COPY OF

SID J. WHITE, Clerk
Supreme Court of Florida

88

CHARLES J. STEIN
Chairman
J. HOPE BARKER
VALENCE G. CROCKETT
ARVING R. CROSS
RAY L. HOWARD
MABEL P. MITCHELL
ROY W. RUSSELL
Commissioner Ex Officio
S. L. WAINWRIGHT, Secretary
Department of Offender Rehabilitation

FLORIDA PAROLE AND PROBATION COMMISSION
P.O. BOX 3168 1117 THOMASVILLE ROAD
TALLAHASSEE, FLORIDA 32303

FEB 22 1978
SUPREME COURT

February 20, 1978

59,127

Mr. Sid White
Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32303

File

Re: Bobby Marion Francis
Case #50-127
PRA# B-009959

Dear Mr. White:

This is in reference to your request of February 10, 1978, wherein you asked for a copy of the presentence investigation in this cause.

Be advised that this subject had no presentence investigation conducted prior to his sentencing from Monroe County Circuit Court for Murder in The First Degree, however in checking the case file material, I found an old Post-sentence investigation that was conducted on this individual in 1964 and also a copy of a Federal Presentence investigation conducted on this subject during January, 1972, and I am enclosing copies of these documents which I trust will help you in your investigation in this case.

If we can be of any further assistance, please do not hesitate to contact our office.

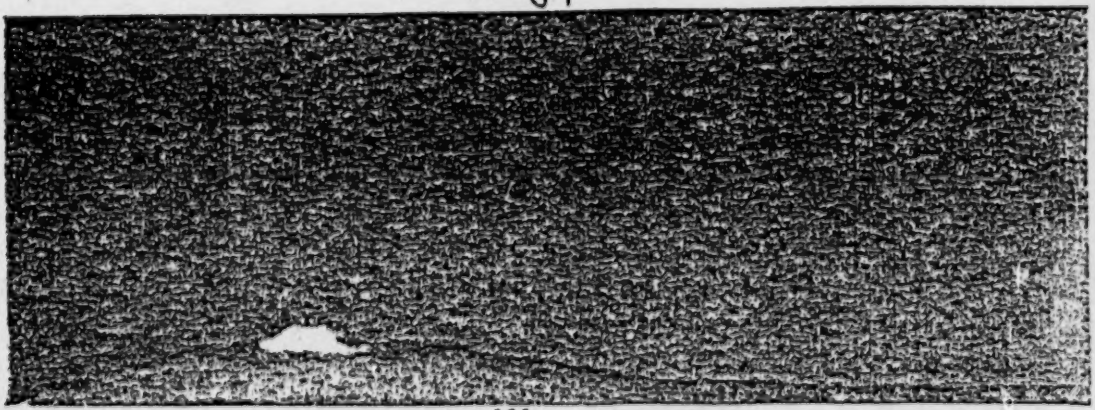
Sincerely,

Kenneth W. Simmons

Kenneth W. Simmons
Deputy Director

KWS/Sca

89



IN THE SUPREME COURT OF FLORIDA

PAUL EDWARD MAGILL,

Appellant,

v. CASE NO. 51,699

STATE OF FLORIDA,

Appellee.

MOTION TO INSPECT AND COPY
PSYCHOLOGICAL SCREENING REPORT AND
PRESENTENCE INVESTIGATION REPORT

Appellant, PAUL EDWARD MAGILL, requests this Honorable Court to enter an order authorizing appellant's counsel to inspect the appellant's presentence investigation report and appellant's Psychological Screening Report, which are before this Court pursuant to its order of May 15, 1978, and in support of said motion would state:

1. During oral argument in this cause on June 21, 1978, Chief Justice Overton referred to the contents of a Psychological Screening Report on appellant prepared by the Department of Offender Rehabilitation, which was appended to the Court's copy of the presentence investigation report. This document is before this Court and bears upon its consideration of the presence of mitigating circumstances in appellant's case. Neither appellant nor his undersigned counsel have been furnished with a copy of that report. After oral argument, undersigned counsel requested that the Clerk's Office provide her with a copy of that report, but the Chief Deputy Clerk, Bernice Smilgin, declined to do so without order of this Court. Appellant submits that the considerations of Gardner v. Florida, 51 L.Ed.2d 393 (1977) require that appellant's counsel be provided with a copy of this Psychological Screening Report.

2. Appellant also requests this Court to enter an order authorizing appellant's undersigned counsel to inspect and copy

all portions of the appellant's presentence investigation report, which this Court ordered included in the record of this case on May 15, 1978. Although undersigned counsel has been furnished with a copy of what purports to be the presentence investigation report in appellant's case, appellant's counsel has not had an opportunity to determine if that document is identical to what has been filed before this Court. Appellant submits that his counsel is entitled to inspect and copy all portions of all reports which have been filed under the heading of "presentence investigation report" with this Court.

WHEREFORE, appellant prays this Court to enter an order authorizing appellant's undersigned counsel to inspect and copy all portions of the appellant's presentence investigative report and the Psychological Screening Report, which have been made a part of the record on appeal in this case.

Respectfully submitted,

Margaret Good

MARGARET GOOD
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Michael Davidson, Esquire, Assistant Attorney General, The Capitol, Tallahassee, Florida, this 21 day of June, 1978.

Margaret Good
MARGARET GOOD

IN THE SUPREME COURT OF FLORIDA

FRIDAY, JUNE 23, 1978

PAUL EDWARD MAGILL,

Appellant,

vs. CASE NO. 51,699

STATE OF FLORIDA,

Appellee.

* * * * * * * * * * * * * * * * * * *

Appellant's Motion to Inspect and Copy Psychological Screening Report and Presentence Investigation Report is hereby granted.

A True Copy

TEST:

By: Eunice L. Smelzer
Chief Deputy Clerk

Sid J. White
Clerk, Supreme Court

R

cc: Margaret Good, Esquire
Michael H. Davidson, Esquire

DEPARTMENT OF OFFENDER REHABILITATION
FLORIDA STATE PRISON
P. O. BOX 747
STARKE, FLORIDA
32091

51,694

FILED
JUN 6 1978
CLERK SUPREME COURT

PSYCHOLOGICAL SCREENING REPORT

TE June 7, 1977

E MAGILL, Paul Edward NUMBER 059128 AGE 18 RACE Caucasian

ENSE First Degree Murder SENTENCE Death

T IQ 100-110 INTELLIGENCE Normal Range

CATION: (verified: yes__ noXXX GRADE COMPLETED 12th COLLEGE --- AGE___

SON FOR NOT COMPLETING EDUCATION Instant Offense

ERACY: Reading Level 7.5-8.5 Relative Grade 8.0

ATION: (unverified) _____

SENT INTEREST Religion and Education

CIAL DIFFICULTIES History of Suicide, drug and alcohol abuse

CHOLOGICAL OBSERVATIONS:

The subject, Paul Edward Magill, #059128, is an eighteen year old caucasion male currently sentenced to death for Murdering the cashier in a convenience store after Robbing and Raping her. The subject states this offense was precipitated by an argument with his mother in December of 1976. The subject reports that he is being raised by his mother after the death of his father, a retired Air Force colonel.

This is not the subject's first experience with legal troubles as he has also been charged with indecent exposure, generally occurring in public places to members of the opposite sex. It was noted that the target individuals were all of equal age.

When examined the subject was in good contact with reality, with no observable signs of a mental or thought disorder. Memory of near and distant events was clear and within normal limits. The subject admitted his guilt in this offense, but attributed it to increased pressure at home resulting in some sort of seizure as the subject described it.

Psychometrics reveal considerable signs of extremely impulsive behavior, coupled with a psychopathic-anti-social personality character. The subject shows very limited control in stressful situations. Results were negative for any form of psychosis at this testing.

RECOMMENDATIONS:

Presently the subject does not appear to be in much stress, however, should these feelings develope the subject will quite possibly become suicidal. Precautions shall be routinely maintained by monitoring behavior for regression.

Paul C. Decker
Psychologist

PCD:pk

cc: Department of Offender Rehabilitation
Florida Parole and Probation Commission
Inmate Master File
Department File

Supreme Court of Florida

Tallahassee 32301

SID J. WHITE
CLERK
BERNICE L. SMILGIN
CHIEF DEPUTY CLERK

TELEPHONE:
904-488-0125

June 23, 1978

Margaret Good, Esquire
Assistant Public Defender
Second Judicial Circuit
P. O. Box 671
Tallahassee, FL 32302

Re: Paul Edward Magill vs. State of Florida
Supreme Court Case No. 51,699

Dear Ms. Good:

Please be advised that the Post Judgement Report will be stricken from the above styled cause.

Thank you for your kind cooperation.

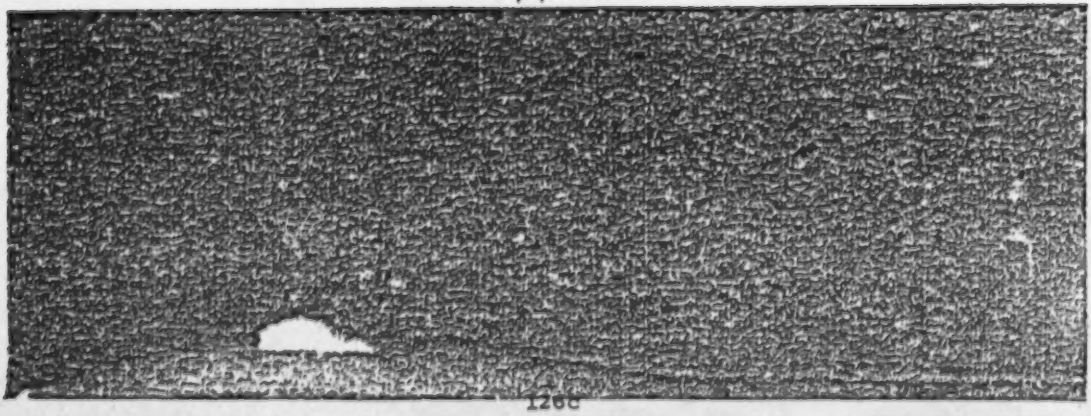
Most cordially,

Bernice L. Smilgin
Chief Deputy Clerk

Sid J. White
Clerk, Supreme Court

SJW:elr

cc: Michael H. Davidson, Esquire



Record Supervisor

BUREAU OF
OFFENDER RECORDS
MAY 20 8 25 AM '79

IN THE SUPREME COURT OF FLORIDA

THURSDAY, MAY 17, 1979

044067 ✓
CB

CLYDE FOSTER,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

CASE NO. 50,393

It is hereby ordered that the Division of Corrections transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this cause.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

cc: Hon. Louie Wainwright

95 127c

IN THE SUPREME COURT OF FLORIDA

FRIDAY, AUGUST 3, 1979

B 015110

JOHN ERROL FERGUSON

APPELLANT,

vs

CASE NUMBER 55,137
55,498

STATE OF FLORIDA

APPELLEE.

IT IS HEREBY ORDERED that the Parole and Probation Commission transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this cause.

A TRUE COPY

TEST:

Sid J. White
Clerk, Supreme Court

BY: Barbara D. Mitchell
Deputy Clerk

BDM
cc: Hon. Louie Wainwright

8-22-79

Re: John Errol Ferguson
B-015110

Supreme Court Clerk's office called requesting copy of PSI. No PSI has been forwarded to this office, nor is there one in the files at Florida State Prison.

The office of Parole and Probation in Miami has been contacted to forward this PSI directly to the Supreme Court, a copy to FSP, and a copy to Central Records for filing.

Also the Admission Summary for this inmate has not been completed (sentenced May 1978). This has also been requested this date from Mr. Brierton and a copy will be forwarded to the Supreme Court by me upon receipt.

Betty Bates

RTMENT OF OFFENDER REHABILITA
INTEROFFICE MEMORANDUM

DATE: August 24, 1979

FROM: Phillip N. Ware — District 07 - Miami

TO: Mrs. Betty Potts — Bureau of Legal Services Tallahassee

RE: John Errol Ferguson — DOC #015110

Per your telephone request of 8/23/79, I am enclosing herewith copies of what appears to be pertinent material in the case of the above-named death row inmate. Please note that I included the original copies of some institutional material as the xerox copies were of poor quality.

As soon as Mr. Lipson can review and have the latest Post Sentence Investigation retyped, I will forward copies to Barbara Maxwell at the Supreme Court, to Bureau of Offender Records, and to Florida State Prison as you instructed.

Phillip N. Ware
District Supervisor
District 07 - Miami

PNW/bjf

AUG

IN THE SUPREME COURT OF FLORIDA

FRIDAY, AUGUST 3, 1979

WILLIAM LEE THOMPSON

APPELLANT,

vs CASE NUMBER 55,697

STATE OF FLORIDA

APPELLEE.

IT IS HEREBY ORDERED that the Parole and Probation Commission transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this cause.

A TRUE COPY

TEST:

Sid J. White
Clerk, Supreme Court

BY: Barbara D Marshall
Deputy Clerk

BDM

cc: Hon. Louie Wainwright

IN THE SUPREME COURT OF FLORIDA

THURSDAY, AUGUST 16, 1979

RALEIGH PORTER

APPELLANT,

vs. CASE NUMBER 55,841

STATE OF FLORIDA

APPELLEE.

****

IT IS HEREBY ORDERED that the ~~Parole and Probation Commission~~ Dept. of Corrections transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this cause.

A TRUE COPY

TEST:

Sid J. White
Clerk, Supreme Court

BY Barbara D. Maxwell
Deputy Clerk

BDM
C: Louie Wainwright
Hon. Jim Smith
Hon. Jack O. Johnson

IN THE SUPREME COURT OF FLORIDA

THURSDAY, AUGUST 16, 1979

AUG 23 4 30 PM '79

Sent Copies of PSI to the Supreme Court.

RALEIGH PORTER A-055640

Appellant,

vs.

CASE NUMBER 55,841

STATE OF FLROIDA

Appellee.

RESPONSE

Comes now, Florida Parole and Probation Commission, and makes this Response to this Court's Order of August 16, 1979 in the above-styled cause.

With all due respect, the Florida Parole and Probation Commission is unable to comply with this Court's Order because it is not the custodian of the documents sought by the Court. All Pre-Sentence Investigations are under the control and custody of the Florida Department of Corrections. See Section 20.315 (22) F.S. Further, the Florida Parole and Probation Commission no longer conducts Pre-Sentence Investigations. That function is also now to the Department of Corrections. See Section 945.25; 945.10 F.S.

In accordance with a request made by the Clerk of the Court, the Florida Parole and Probation Commission is forwarding this Court's Order in the above-styled cause to the Department of Corrections.

Respectfully submitted,

MICHAEL H. DAVIDSSON
General Counsel
Florida Parole & Probation Commission
1309 Winewood Blvd. - Bldg. 6
Tallahassee, Florida 32301
(904) 488-4460

Copy of PSI forwarded to Supreme Court 8-23-79. B. Potts

-:-

101 133c

IN THE SUPREME COURT OF FLORIDA

FRIDAY, SEPTEMBER 28, 1979

Putnam Co.

HALL, FREDDIE LEE, **

Appellant, **

v. ** CASE NO. 54,423

STATE OF FLORIDA, **

Appellee. **

** ** ** ** ** ** ** ** ***

It is hereby ordered that the Division of Corrections transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this cause.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

cc: Hon. Louie Wainwright
Morton D. Aulls, Esquire
H.D. Robuck, Jr., Esquire
Attorney Generals Office,
Tampa

FLORIDA
DEPARTMENT of
CORRECTIONS

Governor
BOB GRAHAM
Secretary
LOUIE L. WAINWRIGHT

1311 Winewood Boulevard • Tallahassee, Florida 32301 • 904/488-5021

October 23, 1979

Mr. Sid J. White
Clerk, Supreme Court
The Supreme Court of Florida
Supreme Court Building
Tallahassee, FL 32301

Re: Freddie Lee Hall, #022762
Case No. 54,423

Dear Mr. White:

In response to the order dated September 28, 1979, it has been determined that no Presentence Investigation was conducted for either of this individual's death sentences.

Mr. Hall was convicted in the Circuit Court for Lake County on June 1, 1978, for MURDER IN THE FIRST DEGREE, and sentenced to death by Judge John W. Booth. Mr. Hall was further convicted in the Circuit Court for Putnam County on June 23, 1978, also for MURDER IN THE FIRST DEGREE and was sentenced to death by the same Judge Booth. No Presentence Investigation was requested on either of these offenses.

Mr. Hall was convicted on August 30, 1978, in the Circuit Court for Pasco County for the offense of ATTEMPTED MURDER IN THE FIRST DEGREE and was sentenced to 30 years in prison to run consecutive with any other sentences by Judge Wayne L. Cobb. Judge Cobb had requested a Presentence Investigation on July 24, 1978, and this was available to him at the time he imposed the prison sentence but was not available to Judge Booth on the previous sentences.

Please advise if we may be of any further assistance to you in this matter.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

William C. Kyle, Jr.
Offender Intake & Investigation
Program Administrator

Leonard E. Flynn, Director
Probation and Parole Services
Program Office

WCK/pg
cc: Inmate File

103

Putnam

IN THE SUPREME COURT OF FLORIDA

TUESDAY, JANUARY 15, 1980

FREDDIE LEE HALL,	**	
Appellant,	**	
v.	**	CASE NO. 54,561
STATE OF FLORIDA,	**	
Appellee.	**	

** ** ** ** ** ** ** ** **

It is hereby ordered that the Division of Corrections transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this cause.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

cc: Hon. Louie Wainwright
Morton D. Aulls, Esquire
H. D. Robuck, Jr., Esquire
Robert J. Landry, Esquire

FLORIDA
DEPARTMENT of
CORRECTIONS

Governor
BOB GRAHAM
Secretary
LOUIE L. WAINWRIG

1311 Winewood Boulevard • Tallahassee, Florida 32301 • 904/488-5021

January 18, 1980

Mr. Sid J. White
Clerk, Supreme Court
The Supreme Court of Florida
Supreme Court Building
Tallahassee, FL 32301

Re: Freddie Lee Hall, #022762
Case No. 54,561

Dear Mr. White:

In response to the Court Order dated January 15, 1980, it has been determined that no Presentence Investigation was conducted for this individual's death sentence in Putnam County.

I am attaching a copy of my letter to you of October 23, 1979, in response to the previous Court Order on this individual.

Please advise if we may be of any further assistance to you in this matter.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

William C. Kyle, Jr.
Offender Intake & Investigation
Program Administrator

Leonard E. Flynn, Director
Probation and Parole Services
Program Office

WCK/de
Attachment

Inmate File

105

Grucker
78-200
78-201
1-19-53

IN THE SUPREME COURT OF FLORIDA

MONDAY, OCTOBER 15, 1979

JIMMIE LEE SMITH

APPELLANT,

vs. CASE NUMBER 55,961

STATE OF FLORIDA

APPELLEE.

****

IT IS HEREBY ORDERED, that the Department of Corrections transmit to the Clerk of the Supreme Court of Florida forthwith the presentence investigation in this cause.

A TRUE COPY

TEST

Sid J. White
Clerk, Supreme Court

BDM
C: Louie Wainwright
Louis G. Carres, Esq.
Hon. Jim Smith

October 26, 1979

Mr. Sid White
Clerk, Supreme Court
Supreme Court Building
Tallahassee, Florida 32301

Re: Jimmie Lee Smith, #035167

Dear Mr. White:

This is in response to your court order of October 15, 1979, directing us to forward a copy of the presentence investigation in the above subject's case.

After checking with the Clerk of the Court, Jackson County and the District Probation & Parole Office for Jackson County, we find that a presentence investigation was not prepared in Mr. Smith's case.

If we may be of further assistance, please advise.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

Louis H. Carmichael
Chief, Bureau of Offender Records

LHC/db

IN THE SUPREME COURT OF FLORIDA

MONDAY, OCTOBER 15, 1979

MANUEL VALLE,	**	
Appellant,	**	
vs.	**	CASE NO. 54,372
STATE OF FLORIDA,	**	
Appellee.	**	
	**	

It is hereby ordered that the Division of Corrections transmit to the Clerk of the Supreme Court of Florida forthwith the presentence investigation in this cause.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

ner
CC: Hon. Louie Wainwright

Ira N. Loewy, Esq.
Elliot H. Scherker, Esq.

FLORIDA
DEPARTMENT of
CORRECTIONS

Governor
BOB GRAHAM
Secretary
LOUIE L. WAINWRIGHT

1311 Winewood Boulevard • Tallahassee, Florida 32301 • 904/488-5021

October 25, 1979

FILED
NOV 5 1979
CLERK SUPREME COURT

Mr. Sid J. White
Clerk, Supreme Court
Supreme Court Building
Tallahassee, Florida 32301

Re: Mahuel Valle, #853220

Dear Mr. White:

We are in receipt of your court order dated October 15, 1979, directing this Department to forward a copy of the presentence investigation in the above referenced individual's case.

A check of our records reflects that a presentence investigation was not prepared on Mr. Valle's death sentence. Subject was on probation at the time the crime was committed and a Violation Report Form was prepared in lieu of a presentence investigation.

We are enclosing a copy of the Violation Report, and request that you please advise if this does not comply with the intent of your order.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

Louis H. Carmichael
Chief, Bureau of Offender Records

LHC/db

Enclosure

MONDAY, NOVEMBER 26, 1979 A63

RAYMOND LEE DRAKE,

Appellant,

vs. CASE NO. 54,850

STATE OF FLORIDA,

Appellee.

****

It is hereby ordered that the Department of Corrections transmit to the Clerk of the Supreme Court of Florida forthwith the presentence investigation in this cause.

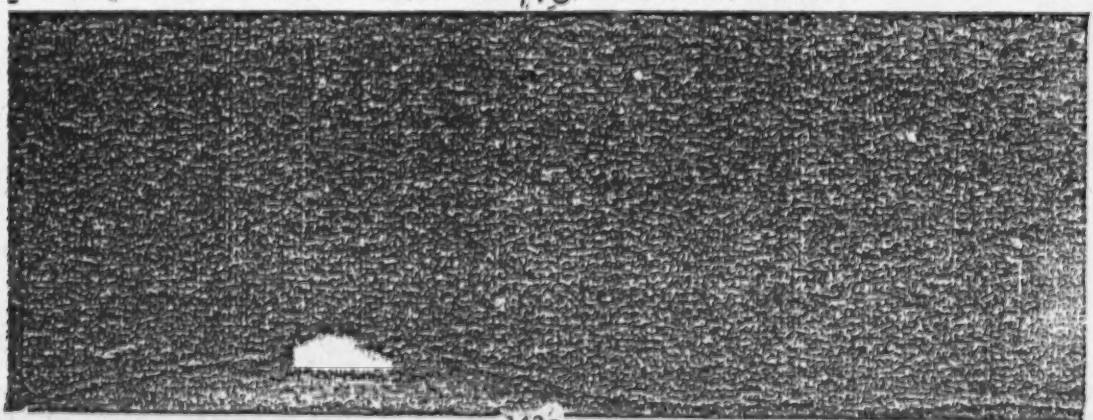
A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

cc: Louie L. Wainwright
Paul C. Helm, Esq.
James S. Purdy, Esq.

110



Best Copy Available

December 5, 1979

Mr. Sid J. White
Clerk of the Supreme Court
Supreme Court Building
Tallahassee, Florida 32304

RE: Raymond Lee Drake, #A055442

Dear Mr. White:

This is in response to your court order dated November 26, 1979, in the above named individual's case #54,850.

Attached is a presentence investigation completed, covering this individual's Involuntary Sexual Battery offense, for which he received a 6-month to 5-year sentence in August of 1976. This individual was released on parole, violated the conditions thereof, and was returned to our custody under the Death penalty in 1973.

The investigation of the murder sentence was completed on Form-91, copy of which is attached completed by his parole supervisor. We do not have a presentence investigation in this murder case, only the Form-91, which is attached.

If we can be of further assistance please let us know.

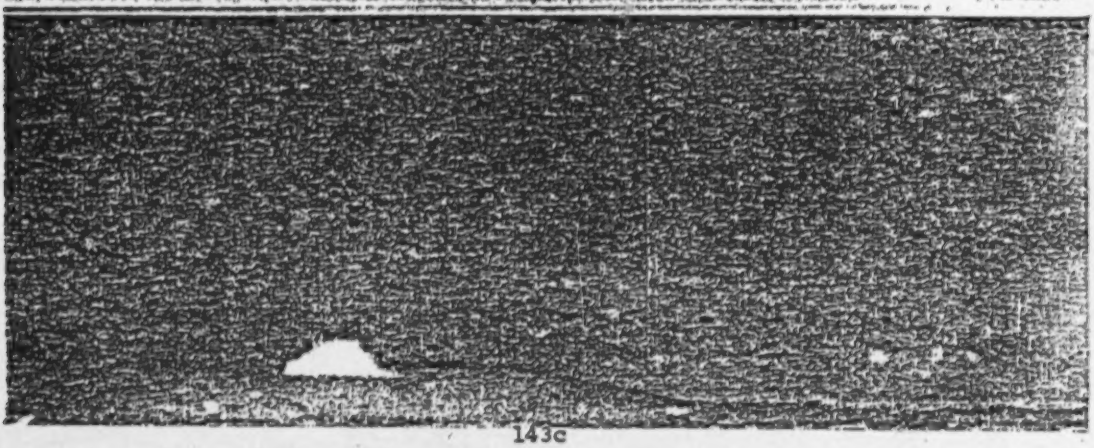
Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

Joye C. Bruce
Assistant Inmate Records Administrator

JCB/sl

Attachment



Escambia

IN THE SUPREME COURT OF FLORIDA

TUESDAY, JANUARY 15, 1980

JOHNSON, MARVIN EDWIN,	**	
Appellant,	**	
v.	**	CASE NO. 56,167
STATE OF FLORIDA,	**	
Appellee.	**	

** ** ** ** ** ** ** ** **

It is hereby ordered that the Division of Corrections transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this cause.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

cc: Hon. Louie Wainwright
Louis G. Carres, Esquire
A. S. Johnston, Esquire

FLORIDA
DEPARTMENT of
CORRECTIONS

Governor
BOB GRAHAM
Secretary
LOUIE L. WAINWRIGHT

1311 Winewood Boulevard • Tallahassee, Florida 32301 • 904/488-5021

January 18, 1980

Mr. Sid J. White
Clerk, Supreme Court
The Supreme Court of Florida
Supreme Court Building
Tallahassee, FL 32301

Re: Marvin Edwin Johnson, 8018685
Case No. 56,167

Dear Mr. White:

In response to the order dated January 15, 1980, please be advised that there was no Presentence Investigation ordered by Judge William Frye III in Escambia County prior to sentencing.

Please advise if we may be of any further service to you in the matter.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

William C. Kyle, Jr.
Offender Intake & Investigation
Program Administrator

Leonard E. Flynn, Director
Probation and Parole Services
Program Office

WCK/de

Inmate File

IN THE SUPREME COURT OF FLORIDA

FRIDAY, JANUARY 25, 1980

JONES, LESLIE R.,	**	
Appellant,	**	
v.	**	CASE NO. 56,199
STATE OF FLORIDA,	**	
Appellee.	**	

** ** ** ** ** ** ** ** ***

It is hereby ordered that the Division of Corrections transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this case.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

cc: Hon. Louie Wainwright
Michael M. Corin, Esquire
David P. Gauldin, Esquire

114

January 31, 1980

Mr. Sid White
Supreme Court Building
Tallahassee, Florida 32304

RE: Leslie R. Jones, #047325

Dear Mr. White:

Attached is the PSI you requested in the Court Order dated January 25, 1980.

If we can be of further assistance please let us know.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

Joye C. Bruce
Assistant Inmate Records Administrator

JCB/sl

Attachment

FILED

FEB 11 1980

047325

STYLE: Leslie R. Jones v. State

CASE NO.: 56,199 DATE: 2/4/80

RECEIPT IS ACKNOWLEDGED OF:

XX Pre-sentence investigation.

- BRIEF
- APPENDIX
- REQUEST FOR ORAL ARGUMENT
- PETITION FOR ATTORNEY'S FEES
- PETITION FOR REHEARING
- ORIGINAL RECORD/EXHIBITS
- PETITION FOR WRIT OF HABEAS CORPUS/MANDAMUS
- ORIGINAL WRIT WITH ACCEPTANCE OF SERVICE THEREON

LETTER OF

RESPONSE TO

COPY OF

SID J. WHITE, Clerk
Supreme Court of Florida

IN THE SUPREME COURT OF FLORIDA

THURSDAY, APRIL 10, 1980

RUFUS EUGENE STEVENS,	**	
Appellant,	**	
vs.	**	CASE NO. 57,738
STATE OF FLORIDA,	**	
Appellee.	**	
	**	

It is hereby ordered that the Division of Corrections transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this cause.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

ner
CC: Hon. Louie Wainwright

John R. Forbes, Esquire
T. Edward Austin, Esquire

FLORIDA
DEPARTMENT of
CORRECTIONS

Governor
BOB GRAHAM
Secretary
LOUIE L. WAINWRIGHT

1311 Winewood Boulevard • Tallahassee, Florida 32301 • 904/488-5021

April 30, 1980

Mr. Sid J. White
Clerk, Supreme Court
Supreme Court Bldg.
Tallahassee, Florida

Re: Rufus Eugene Stevens
DOC #069239
Case No. 57,738

Dear Mr. White:

Pursuant to the Supreme Court Order of 4/10/80, please find attached a copy of the Presentence Investigation conducted by our staff prior to the above named individual being given the death sentence.

If we may be of any further service to you, please feel free to call upon us.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

William C. Kyle, Jr.
Offender Intake & Investigation
Program Administrator

Leonard E. Flynn
Probation and Parole
Program Director

WCK/de
Attachment

cc: Inmate's File

Martin Co.

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, MAY 21, 1980

JAMES A. MORGAN

APPELLANT,

VS

CASE NUMBER 53,418

STATE OF FLORIDA

APPELLEE.

****

IT IS HEREBY ORDERED, that the Department of Corrections transmit to the Clerk of the Supreme Court of Florida forthwith the presentence investigation in this cause.

A TRUE COPY

TEST:

Sid J. White
Clerk, Supreme Court

BDM
C: Louie Wainwright
Craig S. Barnard, Esquire
Paul H. Zacks, Esquire

STATE OF FLORIDA

Office of the Public Defender

FIFTEENTH JUDICIAL CIRCUIT

RICHARD L. JORANDBY
Public Defender

11th Floor / Harvey Building
224 Datura Street
West Palm Beach, Florida 33401

Telephone (305) 837-2150

June 3, 1980

Honorable Sid J. White, Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32604

Re: James A. Morgan v. State of Florida
Case No. 53,418

Dear Mr. White:

I am writing regarding the order entered on May 21, 1980 in the above-referenced case. That order required the Department of Corrections to transmit to your office the presentence investigation in this case.

This letter is to serve as a formal request for notification of any oral or written response by the Department of Corrections relative to that order and to request full conformed copies of all documents, records, reports, etc. furnished to the Court pursuant to that order(regardless of their designation as confidential). Such copies and notification may be served on myself as counsel for Mr. Morgan.

Thank you very much for your assistance.

Cordially,

Craig S. Barnard
Chief Assistant Public Defender

CSB/fw

STYLE: James A. Morgan vs. State of Florida
CASE NO.: 53,418 DATE: 6/9/80
RECEIPT IS ACKNOWLEDGED OF: RECEIVED

- ☐ _____
- ☐ BRIEF
- ☐ APPENDIX
- ☐ REQUEST FOR ORAL ARGUMENT
- ☐ PETITION FOR ATTORNEY'S FEES
- ☐ PETITION FOR REHEARING
- ☐ ORIGINAL RECORD/EXHIBITS
- ☐ PETITION FOR WRIT OF HABEAS CORPUS/MANDAMUS
- ☐ ORIGINAL WRIT WITH ACCEPTANCE OF SERVICE THEREON

JUN 13 1980

PUBLIC DEFENDER'S OFFICE

LETTER OF request--June 3 1980
RESPONSE TO _____
COPY OF _____
_____

SID J. WHITE, Clerk
Supreme Court of Florida

IN THE SUPREME COURT OF FLORIDA

MONDAY, JUNE 9, 1980

PRESTON JUNIOR CRUM,	*	
Appellant,	*	
vs.	*	CASE NO. 57,487
STATE OF FLORIDA,	*	
Appellee.	*	
	*	

****

It is hereby ordered that the Department of Corrections transmit to the Clerk of the Supreme Court of Florida forthwith the presentence investigation in this cause.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

cc: Louie L. Wainwright, Secretary
Robert Q. Williams, Esq.
William H. Stone, Esq.
Edwin H. Duff, III, Esq.

There was no PSI done prior to sentencing!

June 9, 1980

Mr. Sid J. White, Clerk
Supreme Court
Supreme Court Building
Tallahassee, FL

Re: James Aaron Morgan, #062868
Your Number 53,418

Dear Mr. White:

Pursuant to the order of the Florida Supreme Court of May 21, 1980, please find attached a copy of the Presentence Investigation conducted on the above named individual.

If we may be of any further assistance to you in this matter, please advise.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

William C. Kyle, Jr.
Offender Intake & Investigation
Program Administrator

Leonard E. Flynn
Probation and Parole
Program Director

WCK/pg
Attachment

June 16, 1980

Mr. Sid J. White
Clerk
Supreme Court
Supreme Court Bldg.
Tallahassee, FL 32301

Re: Preston Crum, Jr.
A011915
Case No. 57,487

Dear Mr. White:

In regard to the Court's Order of June 9, 1980, please be advised that there was no Presentence Investigation conducted on this individual prior to his being sentenced to death in Lake County.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

William C. Kyle, Jr.
Offender Intake & Investigation
Program Administrator

Leonard E. Flynn
Probation and Parole
Program Director

WCK/de

123

IN THE SUPREME COURT OF FLORIDA

MONDAY, JUNE 9, 1980

GEORGE VICTOR FRANKLIN, a/k/a CHARLES GORDON,

Appellant,

v. CASE NO. 52,971

STATE OF FLORIDA,

Appellee.

** ** ** ** ** ** ** ** ** ***

It is hereby ordered that the Division of Corrections transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentance investigation in this cause.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

cc: Hon. Louie Wainwright
Zebedee W. Wright, Esquire
State Attorney, Ft. Lauderdal

June 16, 1980

Mr. Sid J. White
Clerk
Supreme Court
Supreme Court Bldg.
Tallahassee, FL 32301

Re: George Victor Franklin
a/k/a Charles Gordon
062595
Case No. 52,971

Dear Mr. White:

Pursuant to the Court's Order of June 9, 1980, please find attached a copy of the Presentence Investigation for the above named individual regarding his conviction in Broward County for Murder In The First Degree.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

William C. Ryle, Jr.
Offender Intake & Investigation
Program Administrator

Richard D. Flynn
Probation and Parole
Program Director

WCR/dc
Attachment

Wakulla
A046920

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, AUGUST 6, 1980

FRANK SMITH JY

Appellant,

v. CASE NUMBER 57,743

STATE OF FLORIDA

Appellee.

/

IT IS HEREBY ORDERED, that the Department of Corrections transmit to the Clerk of the Supreme Court of Florida forthwith, the presentence investigation in this cause.

A TRUE COPY

TEST:

Sid J. White
Clerk, Supreme Court

BY: Barbara D. Maxwell
Deputy Clerk

BDM
C: Louie Wainwright
Philip J. Padovano, Esquire
David McGee, Esquire
Hon. Jim Smith

FLORIDA
DEPARTMENT of
CORRECTIONS

Governor
BOB GRAHAM
Secretary
LOUIE L. WAINWRIGHT

1311 Winewood Boulevard • Tallahassee, Florida 32301 • 904/488-5021

August 26, 1980

Mr. Sid J. White
Florida Supreme Court
Supreme Court Building
Tallahassee, Florida 32304

RE: Frank Smith, Jr., DOC# 046920
Case# 75,743

Dear Mr. White:

Please disregard my letter of August 18, 1980, allegedly attaching a copy of a Presentence Investigation on the above named individual. It was brought to my attention by Ms. Phyllis Bamburg of your office on August 25, 1980, that the report sent to you was actually a Postsentence Investigation.

This is to inform you that there were no Presentence Investigation conducted for this individual's sentence from Wakulla County. It would be appreciated if you would return the copy of the Postsentence Investigation to this office.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

William C. Kyle, Jr.
Offender Intake & Investigation
Program Administrator

Leonard E. Flynn
Probation and Parole Program
Director

WCKJr/jw

cc: Inmate file

FLORIDA
DEPARTMENT of
CORRECTIONS

Governor
BOB GRAHAM
Secretary
LOUIE L. WAINWRIGHT

1311 Winewood Boulevard • Tallahassee, Florida 32301 • 904/488-5021

August 18, 1980

Mr. Sid J. White, Clerk
Supreme Court
Supreme Court Building
Tallahassee, Florida 32304

RE: Frank Smith, Jr., #046920

Dear Mr. White:

Pursuant to the courts order of August 6, 1980, please find attached a copy of the Presentence Investigation for the above named individual.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

William C. Kyle, Jr.
Offender Intake & Investigation
Program Administrator

Leonard E. Flynn
Probation and Parole Program
Director

WCKJr:jv

Attachment

cc: Inmate File

In error!
No PSI!!

AFFIDAVIT

STATE OF FLORIDA
LEON COUNTY

I, LOUIS G. CARRES, first having been duly cautioned and sworn state the following:

On September 13, 1977, I personally reviewed certain inmate files maintained by the Department of Offender Rehabilitation (now Department of Corrections) at it's central office in Tallahassee, Florida. At that time and place I personally observed three (3) letters from the Supreme Court of Florida requesting that the Department of Offender Rehabilitation forward to the Court the latest psychiatric evaluation on three (3) inmates who were on death row to wit: (1) Robert Fieldmore Lewis; (2) Rocco Surace; and (3) Anthony Antone. The letter from the Supreme Court of Florida pertaining to Mr. Lewis was dated August 4, 1977. The letter from the Supreme Court of Florida pertaining to Mr. Surace was dated February 10, 1977. The letter from the Supreme Court of Florida pertaining to Mr. Antone was dated March 4, 1977. In reviewing these three (3) letters I noted there was no indication on them that counsel for the applicable inmate-appellant had been advised of the Court's request by copy thereof.

Before me this date personally appeared Louis G. Carres, who having been duly sworn, deposes and says that the above information is true and correct to the best of his knowledge and belief.

Louis G. Carres
LOUIS G. CARRES

Sworn to and subscribed before me this 28th day of August A.D. 1980.

Patricia W. Matthews
Notary Public
State of Florida at Large

My commission expires Notary Public, State of Florida at Large
My Commission Expires March 7, 1982

ST. PETERSBURG TIMES city AND state

- Florida, 2-B
- Bothwell, 3-B
- Obituaries, 7-B

section B
TUESDAY, AUGUST 19, 1980

Justices saw 'confidential' psychological profiles of death row inmates

By KELLY SCOTT
St. Petersburg Times Staff Writer
© 1980, The St. Petersburg Times

TALLAHASSEE — Without the knowledge of defense attorneys, the Florida Supreme Court obtained psychological profiles of at least 20 men who were waiting on death row for the court to review their death sentences.

The practice apparently violated a U.S. Supreme Court decision giving all defendants a constitutional right to see and challenge any information used in determining their sentences.

"In some cases, we ended up with information we were not supposed to see," Justice Ben F. Overton conceded in an interview with *The St. Petersburg Times*.

But he said the court got the reports "inadvertently" and denied that justices actually used the reports in deciding whether the men should be given life in prison instead of death in the electric chair.

THE PROFILES were written by a psychologist in the State Department of Corrections after interviews and tests of the condemned men. The inmates were never told that the information might be used by the Supreme Court as it decided whether to uphold or overturn their sentences.

Overton, who was chief justice when the court obtained the reports, said the court had asked the Corrections Department for presentence reports, but sometimes received reports compiled after the sentencings.

Court records show, however, that the court specifically asked for the psychological profiles.

The reports were later removed from the court file, but not before some of the justices saw them.

"The appellate process was compromised," said Bruce Rogo, a professor of law at Nova University who represents a death row inmate. "It was error to go outside the record, especially without notifying opposing lawyers. It was wrong for that to happen. They have admitted that by stopping the practice."

Another defense lawyer, Ted Mack of Tallahassee, has already raised the issue with the court. On behalf of convicted killer Charles Dwight Messer, Mack is seeking a hearing to determine whether the court received a psychological report on Messer, whether any justices read it and when it was destroyed.

"I think there's a very serious legal and ethical question that the Supreme Court is going to have to answer to," Mack said in a recent interview.

It's possible that some of the defendants whose profiles were obtained by the court will get new sentencing hearings because of the mistake. The mistake will not affect the convictions themselves.

THOUGH SOME OF THE justices remembered looking at the reports, all of them said the reports had no effect on their decisions.

Alan Sundberg, who became chief justice last month, figures he read the reports. "I don't have any independent recollection," he said. "I'm sure I did."

Asked if he thought it was appropriate for him to read them, Sundberg said, "If you ask if it influenced my decision, no, I don't think it did. I'm more concerned about that transcript, what the record says . . . I don't believe I was compromised, if that's your bottom line."

Justice Arthur England said he remembers seeing the reports in the files under a distinctive pink cover sheet, but he said he did

See PROFILES, 6-B

Profiles from 1-B

not read them. "The answer to your question is it would be pretty outrageous if we considered something like that, because it's not part of the record. And we haven't," England said.

"I might have seen one," said Justice James C. Adkins. "I would have casually overlooked it if I did. I've never read one. I wouldn't pay any attention to it. I would never request anything like that. I'm just not one of them that does that, requests anything further. I don't think we should."

Joseph W. Hatchett, who left the court in 1979 to become a federal appeals judge, would not comment. "You have to understand, there could be litigation on that matter, and I was a member of the court at the time," Hatchett said.

Justice Joseph A. Boyd said, "The only time we would do it (order the reports) would be if the trial record indicated there was some reason to."

BOYD SAID HE did not know that some attorneys were not aware their clients were being psychologically evaluated for the Supreme Court's review. "If the lawyer didn't get notified, I think that's very interesting. The court would like to know why that happened," Boyd said.

Even if justices did read the psychological reports, Justice Overton said, they wouldn't have considered them in determining the appropriateness of the sentence. "Judges are trained to make their consideration based solely on what is admissible," Overton said.

Fred Karl, the seventh member of the court when the reports were being received, could not be contacted.

Records of the Supreme Court and the Corrections Department show that 19 psychological reports on condemned murderers were sent to the court between November 1976 and May 1978. A psychological report on death row inmate Douglas Ray Meeks was requested and sent to the court as early as March 1976. Gov. Bob Graham signed a death warrant for Meeks on Jan. 9, 1980, but Meeks won a stay of execution.

Most of the men are still on death row, but the Supreme Court granted new sentencings or actually reduced the sentences to life for a few of the men. Among the cases are these:

- Carl Ray Songer, convicted of murdering a Florida Highway Patrol trooper in Citrus County in 1973 after escaping from an Oklahoma prison.
- Anthony Antone, convicted in the 1975 murder of Tampa policeman Richard Cloud.
- Arthur F. Goode III, convicted of killing an 11-year-old boy from Falls Church, Va. and a 9-year-old boy from Cape Coral.
- Daniel Morris Thomas, twice sentenced to death for his role as leader of the ski-mask gang, which terrorized towns in Central Florida in late 1975 and early 1976.

A PSYCHOLOGICAL REPORT was also requested and received on Jesse Lamar Hall, who was convicted in Pinellas County in 1976 of the murder of two Palm Harbor teenagers. Hall's conviction was reversed by the Florida Supreme Court late last year. Before a retrial, Hall pleaded no contest to murder and was sentenced to life in prison.

The requests for the reports apparently stopped in mid-1978, after an exchange between a defense attorney and Overton during oral arguments in the Paul McGill case.

McGill, 18, had been convicted and sentenced to death for robbing, raping and murdering a young female convenience-store clerk near Ocala. On appeal, Overton asked an assistant attorney general about McGill's reactions under stress and his suicidal tendencies.

"We have a copy of a psychological screening report and that screening report says in part that he feels very limited control in stressful situations . . . and then also shows that he will become possibly suicidal," Overton said during the hearing.

Margaret Good, a Tallahassee public defender who was arguing McGill's case, told the justices she didn't have a copy of the report and didn't know it was part of the record in the case.

The next day she filed a motion to get a copy, and the court gave her one. But the same day, Ms. Good received a letter from Court Clerk Sid White stating that the psychological report had been "stricken" from the case.

Overton said he recalls that he was the one who discovered that the reports were in the files, but he does not recall whether it was because of the McGill case.

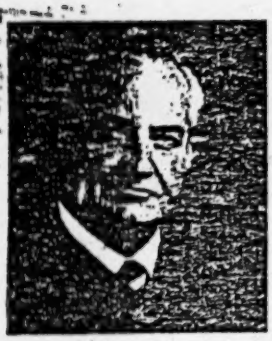
OVERTON SAID THE reports, including the one in the McGill case, were obtained by mistake during the court's effort to fulfill the edict of the U.S. Supreme Court in the case of *Gardner vs. Florida*.

Daniel Wilbur Gardner was convicted and sentenced to death for the stabbing murder of his wife in Citrus County. But the U.S. Supreme Court, while upholding the conviction, overturned the death sentence because the judge considered a "confidential" portion of a presentence report, which Gardner's attorneys had not been permitted to see.

The U.S. Supreme Court said Gardner was denied due process of law because he could not deny or explain information in the report before he was sentenced to death. The Florida Supreme Court had said that the practice was constitutional.

Gardner was resentenced to life in prison.

After the U.S. Supreme Court's ruling, Overton said, the Florida Supreme Court made a special effort to seek any information the trial judge had when he sentenced a



'In some cases, we ended up with information we were not supposed to see.'

— Justice Ben F. Overton

convicted man to death.

For example, a "Gardner order" form was printed and sent to each trial judge who sentenced a convicted man to death. The order asks the judge to return a sworn statement saying whether he or she considered any information that the defendant or his defense attorney didn't know about.

ANOTHER PART OF THE court's effort, Overton said, was to ask the Florida Department of Probation and Parole for any background report on the death row inmate, called a pre-sentence investigation (PSI) report, that the trial judge had.

"What we asked for was the PSI, and we ended up getting a post-sentence report and the psychologicals," Overton said. "It's not unusual that it (a psychological report) would be attached to the post-sentence report. That is not what we intended to have or what we should have had."

But the psychological reports were not attached simply as a matter of routine. Court Clerk White's office sent a separate letter asking for them.

One letter ordered the PSI, and copies of the letter were sent to prosecutors and defense attorneys.

The second letter went to the Department of Offender Rehabilitation, which has since been renamed the Department of Corrections. "This is to request a copy of the latest psychiatric evaluation made on the above-named inmate who is on death row." In only one case is there a notation that copies ... the letter were sent to lawyers involved in the case, and that defense attorney says he never got the court's letter or a copy of the psychological report.

Overton said he did not direct White to send separate letters. "They were to get the necessary information, that's all," Overton said.

After he decided the court shouldn't have gotten the psychological reports, Overton said, he directed Sid White to "review everything in the files and make sure we didn't have anything that was done subsequent to sentencing."

WHITE, WHO IS IN charge of all court records, said Overton told him to remove all the reports from the files. The reports were destroyed, White said.

Overton could not explain why, if the requests were routine following the *Gardner* decision, psychological reports were requested on some death row defendants and not others. And the court requested at least five of the profiles before, rather than after, the U.S. Supreme Court's ruling in *Gardner*.

White says the assistant clerk who wrote the letters misunderstood his instructions and mistakenly wrote the letters requesting the psychological reports.

Overton later called *The Times* to say he had found the form letter from which the assistant typed the requests. It indicates that copies should be sent to all attorneys, Overton said. It was a clerk's error, he said, that no copies of the Supreme Court requests were actually sent to the lawyers.

"I'm not saying that people don't goof," Overton said. "Even newspapers make mistakes."

He added, "There was no intent to hide anything or no intent to get any information the lawyers didn't have."

In one of the cases the court was considering, there was a mention of a psychological evaluation done in concert with the pre-sentence investigation, Overton said. The court wanted to see that, and White's office interpreted that as an order to get psychological reports in all cases, he said.

Vernon Bradford, a spokesman for the Department of Corrections, confirmed that the Supreme Court requested the reports. There is no record, he said, of exactly how many were requested or when the practice stopped.

THE PRISON SYSTEM employs a full-time psychiatrist, a full-time clinical psychologist and two psychologists with master's degrees.

All prisoners, including death row inmates are tested when they enter the prison system and "from time to time" as part of a review of their progress, Bradford said. The prisoners are interviewed and given standardized tests. Their lawyers are not routinely notified.

These are the reports that were sent to the court, Bradford said.

"Now you have to consider, what are the legal consequences of that mistake?" said Rogo of Nova University. "Was there any harm caused? Each attorney will have to review his or her case, look at the whole record and measure this against it."

TAMPA TRIBUNE - WEDNESDAY, AUGUST 20, 1980

Justices Admit Access To Death-Row Inmate Reports

TALLAHASSEE (UPI) — Supreme Court justices admitted Tuesday they had access to psychological reports on 20 death-row inmates that they should not have seen while reviewing the appropriateness of the penalty in the cases — but denied it influenced their decisions on whether the men should live or die.

"I am satisfied to a moral certainty that the reports did not influence the outcome of any case," Chief Justice Alan Sundberg said in an interview.

"To the extent that anyone can demonstrate prejudice," he said, "the court will entertain appeals and we'll have to take it on a case-by-case basis."

Tallahassee attorney Ted Mack has raised the issue on behalf of convicted killer Charles Dwight Messer. He asked for a hearing to determine if the court received a psychological report on Messer and whether the justices read it.

"I think there's a serious legal and ethical question that the Supreme Court is going to have to answer to," he said.

If the court should find error, it would not affect the conviction, but only the sentence.

The St. Petersburg Times revealed in a copyrighted story Tuesday that the court, without the knowledge of defense attorneys, obtained psychological profiles of at least 20 men waiting on death row for the court to review their sentences. The reports were made by the Department of Correction's parole and probation section between 1976 and mid-1978.

The U.S. Supreme Court has ruled that the courts cannot use any information in sentencing a convicted murderer that is not also available to defense attorneys.

Justice Ben Overton was chief justice at the time the post-sentencing psychological reports were received. He said they were obtained by mistake by the clerk's office. When the error was discovered, he said, the reports were removed from the files and returned to the department.

Overton said the court wanted to be sure it had all the information available to the trial judge in sentencing a convicted killer to death rather than life in prison.

In one case, he said, reference was made to a psychological report that was not in the file.

"One judge (nobody now can remember which one) noticed it and asked the clerk to get the report," Overton said. One of the deputies interpreted the instruction to mean that psychological reports were to be required in all cases, rather than just the one.

Overton can recall reading only the report on the case which prompted the complaint. Sundberg can't recall any of them, but said if they were a part of the record, he must have read one or more of them.

"But I am confident it did not affect the outcome of a single case," he said.

Justice Arthur England recalled seeing the reports, but said he didn't read them, adding, "It would be pretty outrageous if we considered something like that because it's not part of the record. And we haven't." Justice James Adkins Jr. said he might have seen one or more but never read them. Justice Joe Boyd said he didn't know attorneys were unaware that their clients were being psychologically evaluated and wants to know why they weren't told.

Two other justices on the court at the time — Fred Karl and Joseph Hatchett — are no longer members. Karl is in private practice and Hatchett is a federal appeals judge.

One of the cases in which a report was requested was that of Douglas Ray Meeks for whom the governor signed a death warrant last January. Meeks won a stay of execution.

None of the 20 has been executed and most are still on death row. The court granted new sentencings or actually reduced the sentences to life for a few.

Among the cases are Carl Ray Songer, sentenced for killing a highway patrolman in Citrus County in 1973; Arthur Goode III, convicted of killing a young Cape Coral boy in 1976; Anthony Antone, sentenced in the 1975 murder of Tampa policeman Richard Cloud; and Daniel Thomas, leader of a ski-mask gang that terrorized central Florida with a series of killings in 1975.

RUBBER STAMPS

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MIAMI NEWS - TUESDAY, SEPTEMBER 23, 1980

Challenge to death penalty

Papers barred, yet high court looked at them

BARBARA MALONE and KEN WALTON

Defense attorneys across the state are preparing to attack the death sentences of all 131 people on Florida's death row, contending that the Florida Supreme Court looked at psychological reports on some of the condemned in violation of a U.S. Supreme Court ruling.

The defense lawyers say that the Florida justices violated the Supreme Court decision by looking at reports by prison psychologists without disclosing the evaluations to lawyers for the condemned.

That is grounds for overturning the sentences, said the lawyers, most of whom decline to be identified while the statewide challenge is being prepared.

"The U.S. Supreme Court has held that it is just not fair in a death case for a judge to base a death sentence on secret information — that a defense attorney has a right to know what the information is in order to argue against it," said Deborah Fins, an attorney with the NAACP Legal Defense Fund who is helping to coordinate the Florida appeal.

"If judges are making a decision about whether or not you live or die, you want to make sure that the information they are considering is accurate," Fins said.

The reports are based on mental examinations given by staff psychologists when inmates are first admitted to prison. Defense attorneys say death row inmates had no warning that what they told prison psychologists might later be used by a court in deciding whether they should live or die.

The justices acknowledge the court should not have had the reports, but say they never based a life-or-death ruling on one of them.

The defense lawyers claim the court wrongly:

- Decided on its own to obtain the reports, which weren't in trial court files.
- Didn't obtain them in all cases, and didn't explain what criteria it used in deciding when to obtain them.
- Didn't tell the lawyers on either side when it was obtaining them.

The defense lawyers say they don't know on how many occasions, or for how long, the court obtained the psychological reports in death cases.

Justice Ben Overton said the reports found their way into the Supreme Court files "inadvertently" because of an error by a deputy clerk. He said he asked the clerk to get a copy of a pre-sentence psychological report that had been considered by the trial judge but was not in the court file.

According to Overton, the deputy clerk misinterpreted his request, and began routinely ordering post-sentencing psychological reports made by staff psychologists at the Department of Corrections. Overton was chief justice at the time. Overton said he cannot remember the name of the deputy clerk.

Miami lawyer Robert Sherin, who as attorney general successfully argued the constitutionality of Florida's death penalty before the U.S. Supreme Court in 1976, said the attack is just a tactic to stall executions.

"Whenever you're dealing with the death penalty, those condemned to die are going to look for anything they can to delay the process," said Sherin.

He predicted that the legal attack might result in delaying executions "six months or a year," but that it would not result in any reversals of the death penalty.

Defense attorneys say they expect five members of the court to become witnesses. They are Chief Justice Alan Sundberg and Justices Overton, James Adkins, Joseph Boyd and Arthur England. The other two justices, Parker McDonald and James Alderman, were not on the court when it obtained the reports.

Two former justices who sat on the court when it had the reports also are expected to be called as witnesses. They are Joseph Hatchett, now a judge on the U.S. Fifth Circuit Court of Appeals, and Fred Karl, who is in private law practice.

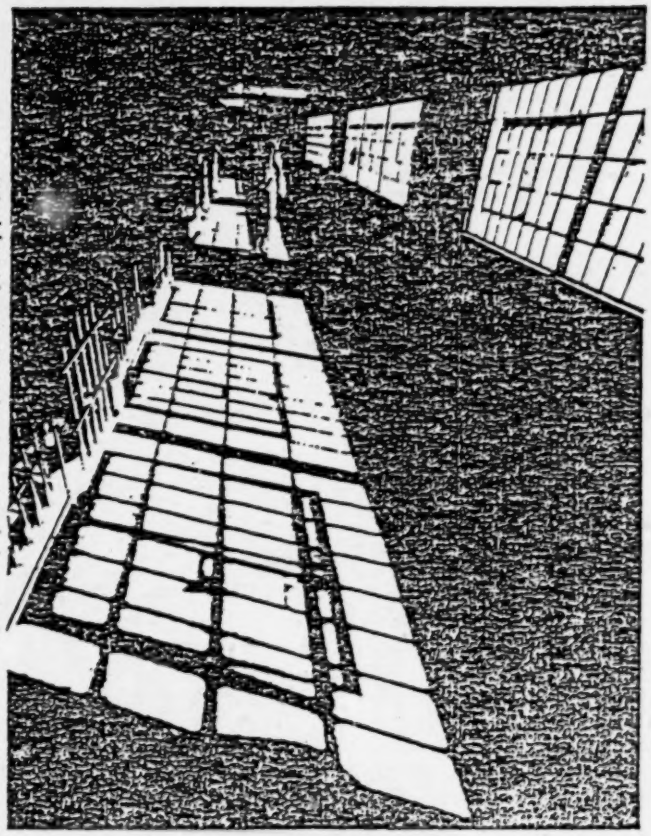
The St. Petersburg Times reported last month that the court in 1976-78 had looked at reports on some condemned men without disclosing them to defense attorneys.

"In some cases, we ended up with information we were not supposed to see," Justice Overton told the Times.

Justice Adkins told The Miami News he was opposed to the practice. "I didn't like what was going on," he said. "It looked to me like it was overreaching."

While several justices acknowledged that they read the reports while considering death sentences, they said they didn't rely on the reports in making decisions on executions.

Defense attorneys say the legal attack will be filed in both state and federal court. The challenge will contend that the court deprived death row inmates of due process of law because their lawyers couldn't explain or refute information in the reports.



The first defense attorney to learn of the practice was Assistant Public Defender Margaret Good of Tallahassee, who in mid-1978 was arguing against the death penalty on behalf of Paul McGill, an 18-year-old convicted to die for robbing, raping and murdering a convenience-store clerk near Ocala.

Overton questioned Good about McGill's mental condition, referring to "a psychologist's warning report ... which says in part that he feels very limited control in stressful situations ..."

Good told the court she did not have a copy of the report. She later filed a motion and obtained one.

The court later reduces McGill's sentence to life. It did not comment in its opinion on whether the psychological report had played a part in the decision.

The incident occurred more than a year after the U.S. Supreme Court held in March 1977, in *Gardner v. Florida*, that defense attorneys in death penalty cases are entitled to any confidential information relied on by the trial judge.

Daniel Gardner had been sentenced to death for stabbing his wife to death in Citrus County. The U.S. Supreme Court upheld his conviction, but overturned the death sentence because the trial judge considered the "confidential" material not disclosed to the defendant's attorneys.

Since that time, defense attorneys from around the state have been pooling information about death cases and have concluded that the psychological reports were considered by the Florida Supreme Court in at least 20, and possibly more, death cases.

Martha Hall, a former law clerk for Justice England when he was chief justice, told The Miami News that she was told to go through about 40 death row files in August or September of 1978 — shortly after Good had learned of the reports — and to pull out all psychological reports.

Hall, who is now general counsel for the Department of Environmental Regulation, said she found reports in about 10 files and removed them. She said that after collecting the reports in a manila folder, she believes she had them shredded.

Hall said she did not make a list of the defendants whose reports she removed, and that she cannot remember the names.

Hall said England's chief law clerk, Mike Moore, told her to get rid of the reports. Moore, who is now with a Tallahassee law firm, said he does not recall saying that.

England said he did not recall seeing any psychological evaluations, or ordering their removal from the file.

"I don't recall having seen a psychological evaluation, but that doesn't mean I haven't read one, I just don't remember," England said.

"I don't remember having a clerk remove the reports from the files, either. But if Marty (Martha Hall) says I told her to do it, I must have told her," England said.

Overton said he considers psychological reports important because a death sentence may be mitigated if the defendant was suffering from extreme mental disturbance or could not control his conduct. But when he discovered psychological reports that had not been provided to defense counsel were in the files, he said, he tried to rectify the situation.

"After I found out what happened I ordered the psychological evaluations pulled from the files because they did not belong there," Overton said.

During the period when the psychological reports were being sent to the Supreme Court, the court upheld the death sentence of John Spenkelink, who was executed in May, 1979. Spenkelink was the first — and so far the only — inmate to be executed in Florida since 1964.

Records in the Supreme Court clerk's office contain no indication that a psychological report on Spenkelink was ordered before his death sentence was upheld, according to deputy clerk Debbie Courseaux.

Hatchett said he expects the psychological reports to result in suits and he will have to excuse himself

Please see DEATH, 8A

from sitting at an appeals court judge because, "I'm sure to be a witness."

Adkins acknowledged having some of the reports, but said he "didn't pay any attention" to them. "The only thing I ever considered was the factual situation and the record that the trial judge had in front of him," Adkins said.

While Adkins said he disapproved of the court's upholding the psychological reports, he said the fact that it did should not "be blood everything into a monumental issue that is going to turn the world upside down."

Sundberg said he remembers seeing some psychological evaluations in the files, and that he read them. "We are obliged to read a death case file from stem to stern," he said.

"I am convinced to a moral certainty that a psychological report did not affect my determination of a case because of the decision-making process I go through," Sundberg said.

Karl, who resigned from the court in April, 1978, said he could not remember whether he had seen any of the psychological reports. But, he said, "I do know that I never voted on a death case unless I could honestly say I had read every word that was available in the file."

Boyd said he "never saw any psychological reports and never read any."

"Somebody was smart enough, if those psychological reports were in there, to pull them out before they ever got to me," Boyd said.

Sid White, clerk of the Supreme Court, said he has an list of the defendants whose psychological reports were ordered, then later pulled from the files.

"You would have to go through each one of the files to look for a copy of the letter requesting the psychological report, and we have not done that," White said.

Chief Deputy Clerk Brenda Smilgis said letters requesting the reports were written by several different clerks and signed by White. Smilgis said she could not recall the name of the original clerk who got Overton's request for a report.

"We thought ordering the reports was a policy set up by the judges. We wouldn't do it on our own. We thought it was what the judges wanted," Smilgis said.

"When Justice Overton told us to stop, we stopped," she added.

Defense attorneys say searching for letters requesting the reports, as White suggested, would not show all cases in which the reports were obtained. Records at the Department of Corrections, spot-checked by The Miami News, show that in some death row cases, psychological reports were sent to the court without a written request.

Defense attorneys say they can't uncover the full extent of the practice until they take sworn testimony from the justices, their former law clerks, and deputy clerks.

If the justices should become witnesses, the case could be heard by Florida appeals court judges brought to the state, or even circuit court judges.

Shevin, the former state attorney general, said he thought the attack would be relevant only in cases in which secret psychological reports had actually been used by the justices. "All of the rest of the attacks would be frivolous," he maintained.

"It's unfortunate there are these delays because if the death penalty is going to serve as a deterrent, it must be carried out," Shevin said, pointing out that although Gov. Graham has signed 12 death warrants, all but Spenkelink's have been stayed by appeals.

Graham signed two death warrants last week, ordering the executions of 35-year-old Lenora Hargrave of Miami and 30-year-old Carl Ray Songer of Citrus County. Hargrave was convicted of killing a Dade convenience store clerk during an aborted robbery in 1974; Songer was convicted of murdering a Florida Highway Patrol trooper in Citrus County in 1973.

Songer's court file shows that he is one of the condemned men whose secret psychological report was ordered from the Department of Corrections. But the file doesn't show whether the report was ever received.

Hargrave's court file contains no indication his psychological report was requested or received.

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CERTIFICATE OF SERVICE

I DO CERTIFY that a copy of the Appendices to the Application for Extraordinary Relief and Petition for Writ of Habeas Corpus has been furnished to the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida 32304 by hand delivery this 29th day of September, 1980.

SAMUEL S. JACOBSON
of counsel

59,732

IN THE

SUPREME COURT OF FLORIDA

JOSEPH GREEN BROWN, et al., Petitioners, - v. - LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida, Respondent.	)	CASE NO.

FILED
SEP 29 1980
SID J. WHITE
CLERK SUPREME COURT

MOTION FOR REFERENCE OF JOINT PETITION TO SPECIAL MASTER AND FOR OTHER APPROPRIATE REMEDIES IN THE EVENT OF FACTUAL DISPUTE

If the factual allegations of the petition filed contemporaneously with this motion are not admitted, petitioners respectfully move that this Court forthwith enter orders immediately necessary to preserve relevant evidence, and then refer their joint petition to a Special Master for hearing, as described more fully below.

The documents which petitioners present in Appendix B to the petition suggest that there have been serious constitutional violations in this Court's adjudication of capital appeals under Florida's "trifurcated" sentencing system. The complete facts are not known at this time, and petitioners lack both the forum and the compulsory process necessary to develop them. Only this Court can establish the comprehensive and systematic procedures to identify and rectify whatever errors occurred, however inadvertently, in connection with this information.

It is clear that this Court is not the place to resolve disputed factual issues. In Gardner v. Florida,

430 U.S. 349 (1977), the State attached to its brief what was purported to be the "confidential" portion of petitioner Gardner's presentence investigation report that had not been disclosed to defense counsel. The Supreme Court of the United States refused to consider or evaluate this document:

> It is not a function of this Court to evaluate in the first instance the possibly prejudicial impact of acts and opinions appearing in a presentence report. We therefore do not consider the contents of the appendix to the State's brief.

Id. at 354-355 n.5. Moreover, the Court made clear in its disposition of Gardner that an evidentiary hearing was necessary before the death sentence could be imposed on petitioner Gardner because many disputed issues had to be resolved by a factfinder concerning the statements in the presentence report. The State had contended that if reversible error had been committed by the non-disclosure of the presentence report, the Supreme Court should remand the case to this Court, and let this Court place the report in the record and then review petitioner Gardner's death sentence on the amended record. The Supreme Court of the United States rejected such a disposition.

In light of the common disclosures and evidence which may be required in an extremely large number of cases -- from the Justices of this Court, court personnel, Department of Corrections employees, Florida Parole and Probation Commission employees and other individuals -- judicial economy and efficiency dictate the appointment of a neutral and detached Special Master to preside over a unitary, adversary fact-finding proceeding. The Special Master should be given an explicit mandate to investigate fully the questions presented in the petition, including, but not limited to, the power to authorize discovery by the

parties, e.g. depositions and interrogatories, and the power to inspect, in the presence of counsel, all records maintained by this Court, the trial courts, Department of Corrections, Florida State Prison, the Florida Parole and Probation Commission, and any other appropriate state agency or office.

It would also then appear, as we must regretfully note, that if this Court refers the joint petition to a Special Master with the capacity to receive testimony, then by the allegations and the nature of this cause the Justices of this Court, because of their direct and unique knowledge of the practices involved, including the alleged destruction of documentary evidence, would be material witnesses with an interest in the outcome of the proceeding, and disqualification would be proper. Under the circumstances present in this cause, disqualification would be appropriate in order for this Court to assure petitioners that they will receive a fair hearing in a fair tribunal -- a basic requirement of due process. In re Murchison, 349 U.S. 133, 136 (1955). Disqualification is needed to avoid even the appearance of impropriety. Fla. Bar Code Jud. Conduct, Canons 2, 3C(1). See Fla. Bar Code Jud. Conduct, Canons 3A(4), 3B(1), 3B(2).

PRAYER FOR RELIEF

Based upon the foregoing, in the event of factual dispute, petitioners respectfully request:

1. that this Court enter its order directing the preservation and maintenance of all files, docket sheets, documents, recordings and other information and material received by, in the possession of, or under the control of this Court pertaining to every capital case filed in this Court since December 1, 1972;

2. that this Court enter its order directing the Division of Archives, History and Records Management,

the Department of Corrections, the Florida Parole and Probation Commission, the judges and clerks of the several judicial circuits of the State of Florida, and any and all other state agencies having access to such files, docket sheets, documents, recordings and other information and material, and the agents and employees thereof, to preserve and maintain intact all files, docket sheets, documents, recordings and other information and material received, in possession of, or under the control of said court or agency pertaining to every capital case filed since December 1, 1972;

3. that this Court enter its order appointing a Special Master to conduct evidentiary proceedings under the conditions described above;

4. that after completion of proceedings by the Special Master, there be a full opportunity for briefing and oral argument on the issues presented herein;

5. that this Court grant its order authorizing the payment of all costs attendant to this proceeding;

6. that this Court grant such further appropriate relief as required by the nature of the proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO CERTIFY that a copy hereof has been furnished to the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida 32304 by hand delivery this 29th day of September, 1980.

Samuel S. Jacobson

SAMUEL S. JACOBSON
of counsel

IN THE SUPREME COURT OF FLORIDA

MONDAY, SEPTEMBER 29, 1980

JOSEPH GREEN BROWN, ET AL.,	**	
Petitioners,	**	ORDER TO SHOW CAUSE
vs.	**	
LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida,	**	CASE NO. 59,732
Respondent.	**	

A Petition for Habeas Corpus and Extraordinary Relief having been filed urging the exercise of the original jurisdiction of this Court, the respondent is directed to respond to said petition on or before October 14, 1980. Petitioners may file a reply on or before October 23, 1980.

Consideration of the Motion for Reference of Joint Petition to Special Master and For Other Appropriate Remedies in the Event of Factual Dispute at this time is premature.

The Applications for Stay of Execution presented on behalf of Carl Ray Songer and Lenson Hargrave in connection with this Petition are granted and the executions of Carl Ray Songer and Lenson Hargrave are hereby stayed pending disposition of this Application for Writ of Habeas Corpus.

This case is set for oral argument on Monday, October 27, 1980, at 9:30 a.m. with one hour to the side allowed for oral argument.

SUNDBERG, C.J., BOYD, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., Concur
ADKINS, J., would deny the Petition for Writ of Habeas Corpus and the Applications for Stay of Execution. Alford v. State, 355 So.2d 108 (Fla. 1977), cert. den. 436 U.S. 935 (1978).

/s/ Sid J. White

Clerk of the Supreme Court of Florida.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

cc: Hon. Jim Smith
Samuel S. Jacobson, Esquire
Marvin E. Frankel, Esquire
Joseph Jordan, Esquire
Hon. Bennett H. Brummer
Hon. Michael J. Minerva
Craig S. Barnard, Esquire

IN THE SUPREME COURT OF FLORIDA

JOSEPH GREEN BROWN, ET AL.,	¶	
Petitioners,	¶	
-vs-	¶	Case No. 59, 732
LOUIE WAINWRIGHT, Secretary, Department of Corrections, State of Florida,	¶	
Respondents.	¶	
	¶	

MOTION TO DISMISS

COME NOW Respondents pursuant to Fla.R.App.P. 9.300 and move to dismiss the Petition filed in the above-styled cause for the following reasons.

I.

The Petition fails to state a legal basis upon which relief can or should be granted.

II.

Either in pursuance of Chapter 79, Fla.Stat., the rules of this Court appertaining thereunto or any cases dealing with petitions for writ of habeas corpus and the requisites therefore, the Petition herein is woefully lacking either in factual allegations or any other particulars deemed necessary as a matter of law.

Petitioners present five grounds upon which they argue collectively they are entitled to relief. Specifically, Petitioners

argue that they were denied due process rights to fair capital review procedures in that this Court requested and received information de hors the record in violation of Gardner v. Florida, 430 U.S. 349, (1977); denied the right to effective assistance of counsel; denied the right to confrontation; denied their Eighth Amendment right to proportionality in capital sentencing in violation of Proffitt v. Florida, 428 U.S. 242 (1976) and denied their right against self-incrimination and the right of the assistance of counsel in deciding whether to exercise their right contrary to Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979) cert. granted 100 S.Ct. 1311 (1980).

Respondents would submit that as to Petitioners' claims that they were denied due process; denied effective of counsel, denied the right to confrontation; denied the Eighth Amendment right to reliability in capital sentencing and denied the rights against self-incrimination and the right of assistance of counsel in deciding whether to exercise that right; Petitioners have failed to individually allege facts which, if true, would entitle them to relief. Each of the above noted rights allegedly denied the Petitioners sub judice, are individual rights which must be exercised by the offended party rather than vicariously through the rights of a third party. In Rakas v. Illinois, 439 U.S. 128 at 139 (1978), the United States Supreme Court expounded upon the particular rights of the Fourth and Fifth Amendments.

> It should be emphasized that nothing we say here casts the least doubt upon cases which recognize that, as a general proposition, the issue of standing involves two inquiries; First, whether the proponent of a particular legal right has alleged "injury in fact," second, whether the proponent is asserting his own legal rights and interest rather than basing his claim for relief upon the rights of third parties.

The Court in Footnote 8 further observed:

> This approach is consonant with that which the court already has taken with respect to the Fifth Amendment privilege against self-incrimination, which also is a purely personal right.

[Id. at 140]

See, also, United States v. White, 322 U.S. 694 (1944); Data Processing Service v. Camp, 397 U.S. 150 (1970). Fisher v. United States, 426 U.S. 319 (1976) and Rawlings v. Kentucky, ___ U.S. ___, 65 L.Ed.2d 633 (1980).

Respondents would submit that as to Petitioners' complaints that their rights have been violated, violations which might have occurred against a few cannot be said to have permeated every Petitioner's case where no factual allegations individually have been made to demonstrate same. Where the particular right is an individual right which must be exercised, Rakas v. Illinois, supra, particular and individual allegations of facts must be set forth before entitlement to a hearing or other relief under habeas corpus proceedings may be granted. In short, there are no allegations of fact by any particular petitioner to show his constitutional rights were violated, which is essential to habeas corpus relief.

The burden is the individual Petitioner's to come forth with sufficient allegations which would entitle him, based on his particular circumstances, to relief. State ex rel Recio v. Simpson, 10 So.2d 909 (Fla. 1942); Ex Parte Stoddard, 34 So.2d 92 (Fla. 1948). Therefore, without factual circumstances being alleged on an individual level, this Court has nothing before it to enable it to pass upon the Fifth, Sixth, Eighth, and Fourteenth Amendment claims raised in unison by Petitioners.

The sole legal issue before this Court and the actual gravamen of the Petition is the question found in subsection (e) of the Petition, to-wit: whether the Eighth Amendment right to proportionality in capital sentencing has been violated. Petitioners assert that:

> The constitutionality of Florida's capital punishment statute was upheld in 1976, on the explicit assumption that review in this Court would be satisfactory to guard against capricious and disportionate infliction of the death penalty.
>
> [Petitioner's Petition - 9]

Petitioners now assert that:

> The receipt of this Court of different information in different cases--information which was not before the trial jury or judge--has eviscerated the system of checks and balances the trifurcated Florida death penalty structure was designed to guarantee.

[Petitioner's Petition - 11]

In essence, Petitioners argue that because of alleged violation in a few cases, which are unspecified and unidentified herein, the entire system has been infected and proportionality in sentencing is no longer plausible in the capital sentencing structure.

> The court's practice thus has prejudiced all capital appellants, both those for whom information may have been received and those whom it has not.

[Petitioner's Petition - 11]

Petitioners liken the alleged receipt by this Court of information not available to the trial judge and jury a violation of Gardner v. Florida, supra. In essence, Petitioners are expanding the concept of Gardner to appeallte review. Respondents would submit that assuming for the moment that the Florida Supreme Court has received information not made available to the trial court and jury, Petitioners or the State, and assuming Gardner v. State, supra, applies to appellate review of proceedings, a violation in a few cases does not mean the entire trifurcated capital punishment structure collapses and all death sentences are invalid. In the very decision that the Petitioners are relying on, to-wit: Gardner v. Florida, supra, the United States Supreme Court did not throw out the capital sentencing statutes, but rather vacated and remanded the case for further disposition by the Florida Supreme Court. Specifically, the Court noted:

> There remains only the question of what disposition is now proper. Petitioner's conviction of course is not tainted by the error in the sentencing procedure. The State argues that we should merely remand the case to the Florida Supreme Court with directions

> to have the entire Pre-Sentence Report made part of the record to enable that Court to complete its reviewing functions. That procedure, however, could not fully correct that full disclosure, followed by explanation or argument by defense counsel, would have caused the trial judge to accept the jury's advisory verdict. Accordingly, the death sentence is vacated and the case is remanded to the Florida Supreme Court with directions to order further proceedings at the trial court level not inconsistent with this opinion.
>
> [430 U.S. 362]

Indeed, this very Court, following the decision in Gardner v. Florida, supra, attempted to correct any Gardner violations in post-Gardner cases by ordering the trial courts of this state in capital cases to respond as to whether Pre-Sentence Investigations were utilized and not made available to given defendants. Many of the Petitioners in this Petition received the benefit of this Court's actions. Similarly, a like result could and should obtain in the case at bar where those Petitioners aggrieved by the alleged activities of this Court can demonstrate that in their particular and individual case, the appellate application of Gardner v. Florida, supra, is a viable complaint.

Thus, the gravamen of the Petitioners' complaint herein and the sole legal issue before this Court must be dismissed for failing to state a valid complaint entitling all the Petitioners to relief.

In Godfrey v. Georgia, 64 L.Ed.2d 398, the United States Supreme Court reversed Godfrey's death sentence and remanded the case for further disposition. The court held:

> Thus, the validity of Petitioner's death sentences turn on whether, in light of the facts and circumstances of the murders that Godfrey was convicted of committing, the Georgia Supreme Court can be said to have applied a constitutional construction of the phrase "outrageously or wantonly vile, horrible, or inhuman in that (they) involved . . . depravity of mind. . ." We conclude

> that the answer must be no. The Petitioner's crimes cannot be said to have reflected a consciousness materially more depraved than any person guilty of murder.
>
> [Id. at 409]

The United States Supreme Court did not strike down the Georgia death penalty statute and all Georgia death sentences, but rather vacated the death sentence and remanded for further disposition. See, also, Presnell v. Georgia, 439 U.S. 14 (1978).

Assuming for the moment that a few of the Petitioners may have a legitimate claim against the reviewing practices of the Florida Supreme Court, this particular contention must fail as a matter of law because there has been no showing nor case authority provided which would support these Petitioners' contention that proportionality in imposing or affirming death sentences has been precluded. See, Spinkellink v. Wainwright, 578 F.2d 582 at 613 (5th Cir. 1978) and Meeks v. State, 382 So.2d 673 (Fla. 1980).

III.

Petitioners argue that they have filed jointly in an interest of judicial economy because of the common issues of law and fact presented citing to In re Baker, 267 So.2d 331 (Fla. 1972). In In re Baker, supra, this Court, following the decision in Furman v. Georgia, 408 U.S. 238 (1972) recognized the need to collectively vacate the sentences of those persons on death row following the fall of the capital punishment structure at that time. That action was in direct response to the United States Supreme Court's striking down capital punishment throughout the country, not just in Florida. To require each of those individuals on death row in 1972 to individually litigate whether they should be on death row would have been ridiculous. Furman v. Georgia, supra, went to the heart of capital punishment and struck it down. In the case at bar, all of these Petitioners on death row in 1980, challenge the efficacy of proportionality review and complain about personal rights which cannot be exercised vicariously. In essence, the complaints herein are both factually and legally wanting, do not go to the very heart of the capital punishment structure, but merely attempt to collectively make their petition whole in spite of the fact that the sum of the parts does not reach that result. The only common thread running through this Petition is the fact that each Petitioner has challenged the status of proportionality in Florida's capital punishment statute. That issue, as a matter of law, must fail, and thus, the common cause which unites Petitioners in In re Baker, supra, does not exist here.

CONCLUSION

Respondents would respectfully urge this Court to grant their Motion to Dismiss the instant Petition in that Petitioners' complaints which allege personal violations of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution are devoid of factual allegations sufficient to support the Petitioners' bald complaints that their rights have been violated. Rakas v. Illinois, supra. In regard to the only legal issue before this Court, to-wit: whether Florida still has proportionality review of the imposition of death sentences, Petitioners have failed to make out a claim as a matter of law which would entitle them to relief. Petitioners have failed to make a prima facie showing that their death sentences which were affirmed by this Court or are pending on review, have been tainted by an alleged appellate Gardner violation which may have occurred in a few unspecified and unidentified cases.

WHEREFORE, Respondents would respectfully urge this Court grant Respondents' Motion to Dismiss.

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TALLAHASSEE, FLORIDA

JOSEPH GREEN BROWN, et al., Petitioners, -vs- LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA, Respondents.	CASE NO. 59,732

PROCEEDINGS:	ORAL ARGUMENT
BEFORE:	THE SUPREME COURT OF FLORIDA
DATE:	Monday, October 27, 1980
TIME:	Commenced at 9:30 A.M. Terminated at 11:20 A.M.
PLACE:	Supreme Court Building Tallahassee, Florida
REPORTED BY:	CATHY HARDEN, CP, CSR, RPR Official Court Reporter

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PROCEEDINGS

CHIEF JUSTICE SUNDBERG: Good morning, ladies and gentlemen. We will convene this morning. We're here on the case of Brown versus Wainwright.

Is Counsel for the Petitioners ready to proceed?

MR. FRANKEL: Ready, Your Honor.

CHIEF JUSTICE SUNDBERG: Please proceed, sir.

MR. FRANKEL: May it please the Court, this application for extraordinary relief and petition for writ of habeas corpus on behalf of 123 petitioners on death row raises fundamental problems that have emerged or appear to have emerged from this Court's efforts to administer its grave responsibility for reviewing every death sentence passed in the state of Florida. From the -- at this point -- undisputed allegations of our application, it appears that these problems arise from the Court's understandable effort to be fully informed about the relevant facts and possibly relevant opinions before it makes its final and independent decision as to who may live and who must die.

The difficulty that has been disclosed as a result of that effort to learn all the possible facts is that it appears to have come to pass that through requests emanating from this courthouse, and perhaps

in other ways, there has come to be placed in the record of this Court in connection with appeals in capital cases important data, information, opinions placed in the Court without notice of those deliveries of information to the appellants or to their lawyers.

In this state of affairs, the Appellants and their lawyers have been deprived of the basic opportunity to consider the materials being used in their cases, to assist -- in the case of the lawyers -- to assist their clients and the Court in understanding, evaluating and weighing these materials.

The result of that course of events in our respective submission on this application has been an array of serious violations of the Constitution of this state and the Constitution of the United States. The kinds of materials to which we refer, and on which this petition is made, are outlined in the papers, but their nature and their extent are matters of importance. And I think it's appropriate to take a minute to enumerate the items which our incomplete understanding reveals to have been placed in this Court.

They include psychiatric evaluations of the capital Appellants. They include psychiatric contact notes, all made by people on this gravest of subjects with respect to capital defendants who are not present,

of course, to be examined or cross-examined; and, more gravely still, all delivered into the courthouse without the knowledge of the Appellants or their lawyers and without any opportunity for them to see these materials and consider them with the Supreme Court.

The materials include similarly psychological screening reports of which the same observations could be made. They include presentence investigation reports, both on the capital crime and, in a number of instances, on crimes other than the one which is the subject of the appeal to this Court.

Even when they relate to the capital crime in question, these reports in a number of instances appear to have been delivered to this Court without the knowledge of Counsel that they were here, and in cases where they were no part of the stated record before the Court on the appeal.

They include in one or more instances reports to the Court of the capital Appellants' refusal to participate in the procedure for a psychiatric evaluation. They include parole reports, reports of violations and other investigations.

In one instance known, and perhaps in others, a Federal presentence report was sent to this Court in

connection with one of these appeals. And without enumerating necessarily everything that's indicated in the Appendix to the petition, I mention also state prison classification and admissions summaries.

JUSTICE ENGLAND: Mr. Frankel, let me ask you to pause there because that, I think in part, goes to the heart of what you are about.

The last three things you mentioned: Recitations -- one of them was recitations of a Defendant's refusal to submit to a psychiatric evaluation. Do you mean the Robert Fieldmore Lewis case, Page 66 of your transcript?

MR. FRANKEL: Yes, Your Honor, I do.

JUSTICE ENGLAND: Is there any other besides that?

MR. FRANKEL: Well, there is no other that we know of at this time, Your Honor.

JUSTICE ENGLAND: Probation and parole violation reports; do you refer there to Valle, Page 109, and Drake, Page 111 of your Appendix, or are there others that I have overlooked?

MR. FRANKEL: Your Honor, I think those are all.

JUSTICE ENGLAND: With regard to prison classifications and admission summaries, I take it you mean Thomas, Page 82 of your Appendix; are there any others?

MR. FRANKEL: Your Honor, I am not certain, but I think there is a case of a Ferguson that's in that category. Let me say, generally, Your Honor, if I may, in answer to this question --

JUSTICE ENGLAND: I haven't asked the question.

MR. FRANKEL: -- that we have had the most limited kind of exploration to uncover the facts about these assertions. We think, as I will be urging on the Court, that enough has been shown to demonstrate a grave and probably fatal defect in the process.

But, if there were issues of fact about how many, and if that matters with respect to each category, as a supplemental motion we've made indicates we need to explore those situations, explore the files and other things to find out.

JUSTICE ENGLAND: Yes, I understand that to be the thrust of what you are saying. My point in raising this was -- and I don't know about Ferguson. I will have to check that. I have been through your Appendix and I thought that these were the ones that you were referring to in these categories.

The Lewis letter, on Page 76, volunteers wholly unsolicited from this Court that a denial of testing was made by Robert Fieldmore Lewis on the advice of counsel.

As I read the Thomas letter on Page 82, it doesn't say that a prison admission summary is being sent to the Court, but it says that was an excuse for their not sending another document that was requested from the Department of Corrections.

As I read Valle's document, there was a violation report prepared and sent to us in lieu of a presentence investigation because we had asked for that.

As I read Drake's, the only letter I see there says that he violated parole by committing the murder with which he was charged, and that was in evidence before the trial.

Now, my question on that is, if these are the only documents that support those three allegations, which are at the beginning of the opinion and which you characterize as very grave mistakes by this Court--which have been picked up and widely broadcast by the media, and have in fact affected the perspective of the process of this Court -- if these are the three things that you rely on for those allegations, do you think those were fair bases for those? Were they made in good faith?

MR. FRANKEL: Your Honor, we think the allegations of this petition are fair and that an appreciation

of their scope, their gravity and their fairness requires addressing all of them. The ones Your Honor mentioned with deference are toward the end of my list. The list began with materials that I believe are much more dramatic and much more troublesome. Psychiatric--

JUSTICE ENGLAND: That may be. It's on Page 2 of your petition, and it's a list --

MR. FRANKEL: Pardon?

JUSTICE ENGLAND: It's on Page 2 of your petition, and it is a list that has no separation, six items put together. Are you now telling me that three are inconsequential?

MR. FRANKEL: No, Your Honor, I am not telling you that. I am saying that as in many other instances in the law, it is the accumulation of circumstances that must be considered in appraising the weight and the gravity of what's being claimed. And I am saying--and this is one of the purposes, I take it, of conversations with the Court in the nature of oral argument--that if we must analyze these materials, I would say that their relative significance and their relative gravity, though I withdraw none of them, varies from item to item. And what we have alleged, for example, is a substantial number already discovered without knowledge of what else might be

discovered if issues of fact really arise about this, a substantial number of psychiatric evaluation reports.

What we have shown in this Appendix with respect to the unfortunate and undoubtedly well intended ex parte character of these submissions includes, for example, in several cases situations like this where, on the same day, there issues out of this Court a request for a copy of the presentence report and a copy of that request goes to defense counsel.

On that same day, there issues out of this Court with respect to the same Appellant, a request for a psychiatric evaluation and no copy to defense counsel of that request.

Now, I started out by saying because on behalf of all these lawyers, I mean to say that our best understanding of how this situation arose is that it stems from what we -- without wishing to be presumptuous -- view as a probably commendable desire in a court saddled with the grim responsibility to leave no stone unturned in acquiring accurate information about the solemn problem of deciding who should be executed and who should be sent to prison for life.

So, as to the problems of motivation, we think they're not important. We think if they were, we would have every reason to feel that the motivations

are humane and positive.

What we complain about is the result of these efforts as nearly as we can reconstruct their origin and their nature. And what we say is that whatever the reason and the cause and the occasion for these ex parte communications in pending cases, whatever the reason for that, it is a violation of the most fundamental notions of fairness in our system of adversary justice. It's a violation of the most elementary kinds of protections that a litigant in any case is entitled to expect from any court, from any judge, at any stage of any proceeding.

JUSTICE ENGLAND: Mr. Frankel, I know you are going to want to get into an argument on each of the legal bases that you assert. But, to help me again understand the thrust of where you are going and what conclusions you draw, the petition appears to cover a number of people whose sentences were imposed by a trial court but are now pending on review here. I'm not exactly certain what relief you request or what you seek as to those. There certainly is no action yet by this Court.

What is it precisely that you would have us do? Is it that you want a new court to replace this one in considering the appeals of those Defendants

because of the overall skewing that has taken place in our processes from 1965?

MR. FRANKEL: Your Honor, our broadest submission, as I will state it now and elaborate it at the Court's pleasure, is that the practice of which these Petitioners complain, however it evolved, discloses defects so pervasive and so fatal in the capital system, capital sentencing system of this state as to invalidate that system and to invalidate the statute under which these sentences are imposed. We urge and press that submission. Obviously, in the course of this argument, subject to the Court's interests and questions, other possibilities will be explored.

But, the answer to Your Honor's question is that if we are right, as we believe, if the system of appeals has been seriously infected and invalidated, then it serves the interests of this Court, as well as the Appellants whose cases are pending here, to press that point in their cases as well as those of others whose appeals have already been decided.

How broadly this cuts and what its consequences may be, are, of course, matters submitted for the Court's judgment. But, it seemed to us in formulating this position, that its breadth and its basic character required us to lay it before the Court with

respect to all the cases potentially affected. And that includes, in our judgment, those that are here or in some way pending in this Court.

JUSTICE ENGLAND: I'm not sure I still follow you. You want to lay before us the argument in those pending cases. Do you want us to vacate death sentences imposed by the trial court for an error which has not yet occurred here in those cases?

MR. FRANKEL: Your Honor, we do, if we're right-- if we're right that the course in which the Court finds itself to which it has been driven in administering this statute, if we're right in saying that that course lays bare the invalidity of that statute, then we would claim nobody can be sentenced to death under it.

JUSTICE ENGLAND: So, it is not this Court which is tainted, because you are not asking for a substitute court who has never been through a process of reviewing something they shouldn't have; you are not asking to replace us as individuals with another Supreme Court. You are saying that no Supreme Court can now properly approve a death sentence because of what we did; is that right?

MR. FRANKEL: We are saying that, Your Honor; we are saying a number of other things depending on --

JUSTICE ENGLAND: No, what I mean --

MR. FRANKEL: -- how this Court -- yes, sir. In order to give you a complete answer, among the things we say are if the State and the Court should find that any of the factual presentations we make require evidentiary exploration, we're saying that this Court with all respect should recuse itself because the actions or non-actions of the Justices of the Court are drawn into question and Justices of the Court might well, however delicately that would have to be handled, might well be called to testify as to how these matters were conducted. In that situation, we would say the Court would be disqualified to sit.

If the statute is as we submit invalid and unconstitutional because of the necessities it has permitted or led to, then, of course, all levels of proceedings under the statute are invalidated and no death sentence can stand.

JUSTICE ENGLAND: You have to help me because there is a leap in there I still don't understand. If we have erred in our process and if, hypothetically, all existing affirmed death sentences are invalid because we skewed the process in some cases, the proportionality requirement requires that all that we have considered must be thrown out, why does that

prevent a new court of another seven people from starting over and applying the statute which the United States Supreme Court has said is valid?

MR. FRANKEL: Your Honor, the United States Supreme Court said that the statute Your Honors have tried so hard to administer was valid in part as a result of certain repairs and improvements that this Court had made, as is its right, in construing that statute. A Supreme Court that was not undivided accepted those administrative additions, judicial administrative additions as answering any objections based on the difference between Florida statute, say, and that of Georgia.

There was a certain assumption of judicial facts underlying the Proffitt decision that led to the sustaining of the statute.

In the fullness of time, if we're right in our fact and in our law, it has come to be seen that the statute doesn't work right, that apart from the relatively, relatively minor omissions from the statute that worry the Supreme Court but that it finally found supplied by this Court -- Dixon and other decisions -- we now discover that this Court behaving responsibly appears to have found it necessary over and over again to fill gaps in this

statute by dealing in ex parte information.

We presume that the Court and we believe that the Court, apart from lawyers' presumptions, has undertaken to do its job the best way it could to make the statute work the best way it could. And our position is that the statute doesn't work. A statute that permits or requires this profound violation of the most basic rights of litigants, rights that litigants have in promissory note cases, can't be an adequate statute for determining who should be sentenced to die at the hands of the State.

CHIEF JUSTICE SUNDBERG: Mr. Frankel, you're suggesting -- the bottom premise here is that this is in the nature of a Gardner violation.

MR. FRANKEL: It is one of our bottom premises, yes, Your Honor.

CHIEF JUSTICE SUNDBERG: Well, why did the same conclusion not flow from the fact that there were Gardner violations at the trial court where there has been resentencing by the same trial judge?

MR. FRANKEL: Your Honor, the violation here is a Gardner type of violation, but its implications and its ramifications, because we're dealing, however regrettably, with the Supreme Court of the State of Florida are much broader, much deeper than the problems

of trial judges exploiting Gardner. Let me --

CHIEF JUSTICE SUNDBERG: Pardon me just a moment so you can explore this with me. Why is the implication greater in this Court's review of a sentence than the implication where a trial judge is in fact imposing a sentence? Two different functions.

MR. FRANKEL: Let me try to answer that, Your Honor. The role of this Court, as I need not remind Your Honor, in the determination that Florida had a valid capital sentencing statute, the role of this Court was central and critical. And its role was to see to it that the rules and the standards for imposing death sentences were fair, reliable, consistent, proportional -- all those things.

This Court supplies the guidelines and supplies the regulatory machinery for making sure that capital punishment is not imposed arbitrarily and capriciously.

CHIEF JUSTICE SUNDBERG: Generally, as a matter of law.

MR. FRANKEL: Generally, as a matter of law. And what the law is, is inseparably related in this field, as in so many others, Your Honor, with what factual things are material. After all, the way the law evolved was by judges, in case after case, deciding what facts made a difference about what. And from

that, in our peculiar system, we inferred rules of law, at least when we were mostly a common law society.

Now, what this Court, in our view, has demonstrated is that in order to make the system work fairly, it was required to deal in a way that in retrospect and in the large turns out to be haphazard and, to put a point on it, arbitrary in its function. That is to say, take any given case where a record has been made in the trial court -- Gardner teaches us that the record on appeal should not be different from the record on which the trial judge decided. It should not be less. We say a fortiori, it should not be more; and that for very critical reasons. When this Court--

JUSTICE ADKINS: Pardon me while I interrupt you there. Your statement that it should not be more. That, of course, is fundamental principles of law. In this part of your argument, if you will, please consider the case of Alvord; are you familiar with that, where we were confronted with the situation where the trial judge in imposing sentence was aware of certain matters. And we pointed out the distinction in that case between being aware of something and considering something.

And we said in the opinion that a trial judge, in performance of his judicial duties, could well

be aware of something, but it does not necessarily invalidate the sentence because it appears that he didn't consider it. Now, that was at the trial level. That case went to the United States Supreme Court. And it was a dissenting opinion which set out the other view, but the majority of the United States Supreme Court denied cert.

Now, my query is: On the motion to dismiss, we, of course, accept everything you said in your petition as being true. And even accepting that and assuming that there was something in the record at our level that was not in the record at the trial level, why shouldn't that same principle be applicable to us on review as it was in the Alvord case where the trial judge was involved?

MR. FRANKEL: Your Honor, first -- and one is driven to repeat that all these things are said with special deference -- first, the question of what happened with these ex parte materials in this courthouse is at some stage question of fact. We have been assured -- I, coming in from the outside, reading the materials and learning from the lawyers involved, the Bar has been assured, death sentence appellants have been assured that the Justices of this Court read all of the files in death cases. Where ex parte materials

have found their way into those files, we are expected and entitled to presume that those portions of the files have been read. It is a deep question of fact whether any judge reading a psychiatric evaluation in a death case would merely be aware of it and not consider it.

And it's important, Your Honor, to have in mind at this point that because of the unequal situation we have here, where it appears that in some cases psychiatric evaluations are obtained and read and in some cases not, this problem may cut more deeply as a result of the cases where Your Honors may have read psychiatric evaluations and set aside death sentences than it does in cases where ex parte materials have been read in connection with affirmances of death sentences.

And let me say why: If -- if by its conduct the Court has shown or maybe inferred to have shown that a psychiatric evaluation made after a man goes to prison is a material item of information in connection with the death sentence that may lead to a reversal and a life sentence, then, depending on what we finally learn are the facts and what the Court finally tells us are the facts.

JUSTICE ADKINS: Let me ask you one other

question. Assuming all of that to be true -- I understand that you are talking about the effect, that the inability of the Court to be aware of something without considering it. That's fundamentally what you are arguing.

MR. FRANKEL: I'm saying more than that, Your Honor. I am saying that you may all unintentionally have done worse injury to the people with respect to whom no ex parte evidence was considered than was done to those where it was considered or where the Court was aware of it because what the Bar was not aware of was that in effectively representing these Appellants, it was appropriate, desirable and useful to get these psychiatric evaluations before the Court because they might help.

JUSTICE OVERTON: Let me ask you this. What's different between those cases where there is a presentence investigation report and those cases where there has been no presentence investigation report, which this Court has approved as far as the matter that it's discretionary with the trial judge whether or not he orders a presentence investigation report? Now, there are cases that have it and there are cases that do not have it properly.

Now, as I understand your argument, is the fact

that if one case has a presentence investigation report, then all cases must have a presentence investigation report; am I correct?

MR. FRANKEL: No, Your Honor, not necessarily. We are not saying that. We're saying that where this Court, the ultimate voice of the State on this question, says something is appropriate, necessary, desirable to consider in connection with a case and where this Court apparently has done that ex parte, so that nobody could know what was material, so that lawyers to that extent functioned in the dark in collecting the materials with which to represent their clients, we say that the whole process has been infected because of the failure to give the guidance and exercise the control and impose the consistency, the uniformity, the rationality, the proportionality that's the key function of the highest court of this state if its statute could be held valid. That's what we're saying at this point.

CHIEF JUSTICE SUNDBERG: Mr. Frankel, this is why -- if I may interrupt -- it gets down to what really baseline the function of this Court is. You used the phrase that we make the final independent decision as to who may live and who may die. Is that an accurate statement? That statement implies that we

impose sentence. And that's why I asked you earlier isn't there a difference in function between the trial judge? Under our statute it's the function of the jury to make a recommendation, it's the function of the trial judge to impose sentence; it's the function of this Court to review sentence, not to impose it.

MR. FRANKEL: Your Honor, let me -- to coin a phrase -- assume arguendo that that's all this Court's function is. And in two minutes I am going to say I think the function is more than that based on what the Court has told the world. Let's suppose that the only function of this Court for the moment is reviewing death sentences. Now, what does it mean to be the court of last resort? It means to be the law-making and the law-giving tribunal for that purpose.

Now, how do lawyers and lower court judges know what the law is? Well, we all know about that. We read the appellate court decisions. We read the opinions and we were taught that it's not just the bland statement of legal conclusions but the facts that the court treats as material that we have to look at in order to know what the law is.

Now, what emerges in that respect alone from this Court's function, this Court may have evolved -- we can't be sure -- in a somewhat chancy and

happenstantial way a rule that one of the material items to be considered in connection with a death case is a post-sentencing psychiatric evaluation.

CHIEF JUSTICE SUNDBERG: Fine. You're suggesting then that this Court simply does not articulate all the facts or all the reasoning upon which it makes rules of law?

MR. FRANKEL: Well, I am suggesting, Your Honor, with respect much more than that because the whole system, the whole system collapses all across the board if beyond failures of articulation, which happen to human beings, even judges, beyond that, the tribunal looks at undisclosed facts that affect its judgment and doesn't tell anybody about that.

Now, one of the basic canons of judicial conduct before you get to the Constitution is that in any kind of case no judge will initiate or receive ex parte communications.

JUSTICE ENGLAND: Well, Mr. Frankel, let me see where that takes you. I am told that the Tallahassee Democrat, a newspaper in this city, produced a series of articles summarizing a book about Theodore Bundy's trials. I, or my wife, we are subscribers to the Tallahassee Democrat. If I understand what you are saying, by not articulating or notifying Counsel that I

received that newspaper, I am ex parte receiving information about a trial of a pending appeal or two, in this Court which has so skewed, tainted, violated the constitutional principles governing review, that I cannot sit fairly and pass sentence -- review sentence?

MR. FRANKEL: Well, Your Honor, with respect, that's not quite what I am saying.

JUSTICE ENGLAND: But, that is what your words have said because you said that we have considered matters which nobody knew about relevant -- I assume relevant -- and material to the process, and that alone has thrown this statute out of kilter.

MR. FRANKEL: Your Honor, I obviously made unfortunate use of the language because I mean to say much more than that. If this Court sits in a case involving General Motors, a civil case, breach of contract case, and its members from time to time have read Fortune Magazine or the Tallahassee Democrat or anything else about General Motors, nobody complains about that. For one thing, lawyers who are alive and well and literate are probably aware that among the items of literature that float around in the world, that judges, like ordinary human beings, may have read are these newspaper things, magazine things and so on.

CHIEF JUSTICE SUNDBERG: Law Review articles.

MR. FRANKEL: Law Review articles. And they may cope with that publicly familiar information. But, if in the General Motors case, Your Honor, the Court sent for an inquiry made about General Motors that bore on this particular breach of contract or even if the Court sent for so bland a thing as a Dunn and Bradstreet and didn't tell anybody about it in connection with that very case, I think the Bar would rise up in outrage. Judges don't do that ex parte. Now, the judge might say --

JUSTICE ENGLAND: That goes to violation of the code of judicial conduct and to behavior. That doesn't go to the material, because I am postulating-- and I don't know -- but I am postulating that in that material of the trial there may have been some discussion in the Tallahassee Democrat of legal material not admitted into the record of those trials, and yet we're supposed to sit here and review the record, as you said, unsupported by outside material, not added to or subtracted from. Isn't the principle the same?

MR. FRANKEL: No, Your Honor, it's not. The due process clause in both your Constitution, which Your Honors know better, and in the Federal

Constitution that governs us all is addressed to flesh and blood human beings living in the real world. And when we consider a case like Gardner which said the trial judge should not look at a confidential presentence investigation statement or statements, I don't think anybody would read that case, Your Honor, to say that that trial judge, if it happened to be in the Bundy case, would be disqualified because he had read the newspaper. I just think there is an enormous difference between those two kinds of information.

JUSTICE ENGLAND: Okay. But, let me ask a follow-up to Justice Sundberg's question. Is the United States Supreme Court's review function in capital cases any different from ours?

MR. FRANKEL: Yes, Your Honor. I do think the function is different. I think the function of this Court is broader, more critical to the sustaining of the statute if it could be sustained, and more nearly, more nearly on the Court's own statements, de novo. This Court has talked of making an independent judgment in sentencing. It's talked of the vital importance of facts, of its careful review of the record.

Now, I don't think the Court has used -- so far as I know -- the standard corpus juris expression "de novo." I don't claim -- we don't claim and I don't

think we have to claim that it is a de novo determination. But, it is certainly much more than a review to see if the findings below were clearly erroneous or anything as simple and detached as that.

JUSTICE ENGLAND: Mr. Frankel, just a second. The last part of my question is, if the United States Supreme Court is a different function -- and I take it you are saying it is not that kind of a review -- how do you explain Godfrey versus Georgia?

MR. FRANKEL: Your Honor, the capital sentencing situation is so tense and so troublesome and so delicate that the line between what the Supreme Court does in normal cases and where it may dip into what are normally State concerns is very hard to discern. And I am not prepared to say I am an authority on that. Normally, it's for the states to say what the rules of evidence are and what rules of procedure are. In death cases that seems to change.

Now, what I would urge upon Your Honors is that if there were no Supreme Court of the United States, and if we assumed, as this petition does assume, that this is the final tribunal; and if we assume, as this petition does assume, Your Honors will realize that lawyers -- lots of lawyers considering a grave matter like this among other things considered where we go,

what kind of proceeding do we bring. Now, for a variety of reasons, we're here and not in some low Federal court.

But, one of those reasons I think we can fairly state to Your Honors is that it really ought to be the function of this Court to speak the final words for this state about a matter involving the life and death of people brought to court in this state. So, I would say that this problem of whether this Court has been forced to deal with so heavy a burden under a statute that doesn't work with guidance on judgments that ought to be legislative, with guidance that is insufficient, under standards that are unacceptable, the judgment about that subject ought to be this Court's, without wondering what the people in Washington will say by way of second-guessing or even intrusion into what's normally state function. Florida has a due process clause. Florida has a code of judicial conduct.

JUSTICE ADKINS: Mr. Frankel?

MR. FRANKEL: Yes, sir.

JUSTICE ADKINS: Let me follow up something on Justice England's questions concerning the newspaper articles in relation to, say, a pending case.

As I understood your argument, in a newspaper

article or something of general dissemination, then you can assume that perhaps defense counsel had equal knowledge and that that's quite different than something that gets into the court file and the defense attorney knows nothing about it. You were drawing that distinction, as I recall; is that correct?

MR. FRANKEL: Yes, Your Honor.

JUSTICE ADKINS: Now, let me ask you: Concerned citizens -- and admirably so -- throughout the state of Florida become interested in the administration of justice. And quite frequently, we get letters from people that are not involved in the lawsuit at all, but people who as citizens feel like they have the right to write something to the Supreme Court -- some are for and some against the death penalty. And it being a matter of great public concern at the present time, it's only natural that we could assume that such correspondence would take place with these letters coming in.

My query is: If a letter comes in and we are aware of the letter, perhaps, or the contents, is that something that could eventually invalidate the death sentences by correspondence with citizens that are not involved in the lawsuit?

MR. FRANKEL: If I have to give a short answer --

which I am not very good at -- I would say the answer is no, Your Honor. That's a relatively insignificant item very familiar to Bench and Bar and we all assume correctly or not that judges are impervious to that. I would add, Your Honors, if the Court were calling upon me to advise that that should be made part of the record in that case. If a letter comes in about Bundy telling the Court what a villain he is and that you ought to affirm his -- I don't know Bundy, but his name was mentioned. He's as good an example as any -- and that his conviction ought to be confirmed for this, that or the other reason, I think that that letter should be made a part of that record. And I know that sentencing judges in places where I have been do disclose such communications to counsel. They are not of great consequence, but even so, counsel, I believe, are entitled to see them.

But, where you're dealing with a course of action by the Court initiating communications, requesting communications, receiving them; and receiving them not from some volunteer letter writer, not from the Tallahassee Democrat, but from the executive branch of government, which taken in the large is the adversary litigant in a case involving death.

JUSTICE OVERTON: Mr. Frankel, do you understand

the procedure in this state concerning presentence investigation reports and where they are put?

MR. FRANKEL: Your Honor, I would not claim to be an authority on where they are put. I believe they wind up in the Department of Corrections at the moment, but --

JUSTICE OVERTON: All right. Let me ask you this. If a presentence investigation report is used in the sentencing process, this Court should have it; should it not?

MR. FRANKEL: I would think so, Your Honor, yes, as part of its consideration of a death penalty. I would think it's appropriate for the Court to have it on the record with everybody knowing the Court has it, not as an item not included in the formal record and then solicited by the Court ex parte as has happened in a number of the cases we cite.

JUSTICE OVERTON: Now, Mr. Frankel, if the Court has requested a presentence -- a copy of a presentence investigation report, and in answer to that request it does not get the presentence investigation report but gets the post-sentence investigation report, which it subsequently returns, does that contaminate that proceeding such that the death penalty could not be imposed?

MR. FRANKEL: It might, Your Honor, because I think -- I say it might because it would depend on what then happened. If, for example, all --

JUSTICE OVERTON: Just the fact that they sent us the wrong document, that it got into the court file.

MR. FRANKEL: If it got into the court file and it set here in that file for a period of months and that was a file that the Justices of this Court review in toto, then I would say that that might well be sufficient in itself to invalidate the decision on the appeal of that death sentence in that case. Again, I'm -- with the Court's permission, since I have had an explanation of these lights and I have a white one, I am going to ask for a very few minutes to take care of the unlikely contingency that Mr. Georgieff will say something that I disagree with. But, I do want to say that our claim rests on a very broad pattern of conduct of its capital sentencing business by this Court that in a strong expression a description of what we do urge vitiates this appellate process which is a keystone of the whole system and demonstrates the invalidity of the system.

So, it is not easy to appreciate what we think is the extent of our position by reducing it to one

case, though if we had only one case here, one petitioner here, the position would be exactly the same. It is an assault ultimately on the system, on the statute under which Your Honors work and acclaim that the statute doesn't work and that it's invalid.

JUSTICE ENGLAND: Mr. Frankel, I don't want you to lose your rebuttal time either, and I will ask Chief if he would allow me in my time a couple more questions because the breadth of your petition is what interests me.

In Appendix B that you have attached to the petition, on Page 19 you have a document that pertains to George Vasil. He's not a Petitioner in this case; in fact, his sentence was reduced to life.

You also have on Page 29 a document from the file of Benjamin Huckaby, who is not a Petitioner and whose sentence was reduced to life.

On Page 76, you have one from Manning, who is not a Petitioner and whose conviction was reversed and remanded for a new trial.

Now, if you are right that the taint that you have alleged in fact has occurred and so affects capital sentencing process you have described in your petition, "The practice of this Court has infected and prejudicially skewed its review of every death sentence.

The capital sentencing process in Florida has become tainted at its highest and most important judicial level." Those are quotes from your petition, Page 13.

If that's correct, then what you are suggesting in Section E, this proportionality review of your petition, doesn't it follow that we must also vacate every life sentence we have imposed on the ground that that was a product of the same fatally defective process?

MR. FRANKEL: Your Honor, it's certainly not our claim and we don't represent anybody who is complaining of a life sentence and would rather be killed.

JUSTICE ENGLAND: That's not the point.

MR. FRANKEL: The point -- well, let's -- we claim the statute is invalid. What happened when Florida's statute was invalidated in effect by Gregg? You vacated all the death sentences.

CHIEF JUSTICE SUNDBERG: Furman.

MR. FRANKEL: Pardon? By Furman, I beg your pardon. You vacated all the death sentences.

JUSTICE ENGLAND: But here you are making a broader claim.

MR. FRANKEL: In a word, that's what we're asking for.

JUSTICE ENGLAND: No, no, you have just told us

that you are making a very broad claim. And I understand that to be that our process has been tainted. That means -- and you talked about the life sentences. That would, I think, mean that we have done something equally egregious in reviewing the life sentences. In fact, that's what you said earlier today.

Should we not, for the very reasons you allege -- this may be the right result -- start this process over with everybody -- I'm going to the process now, not the invalidity of the statute, which I understand to be a different argument. Wouldn't that be the logical conclusion of what you are suggesting?

MR. FRANKEL: No, Your Honor. Apart from whether logic is the life of the law, which I won't bother us with, we're complaining about death sentences. The language has its limits and I have my limits in using it. I am complaining about death sentences. We're complaining about the process by which people are sentenced to die.

Now, we compare them -- we compare them with sentences to life imprisonment in order to bring out and demonstrate the infirmity in the system, but the infirmity of which we complain -- we wouldn't be here if all of these people had life sentences. And a court, after all, I assume hears the complaint of the

aggrieved people who come before it.

Our only complaint is not about how people are sentenced to life imprisonment. That may be some other case. We are complaining about how people are put to death. And a part of that process is that some people get what we want: Life imprisonment. It's not something that the ordinary citizen asks for. But, in these cases these Petitioners say that the sentence they should have had could not be more than life imprisonment because they could not validly be sentenced to die. And when they attack the process, they say it is a process that is inadequate for the execution of defendants.

When the Supreme Court invalidated statute after statute and talked about all of them as being the grounds of decision between those who may live and those who must die, it didn't say a word that impaired or infected the life sentences of any of the states: North Carolina, Georgia, Florida or anybody. Its impact was on the death sentences.

Now, we claim under that jurisprudence, under what's grown up as a kind of somber capital sentencing body of constitutional law that Florida statute is invalid and that the death sentences which confront substantially all of these Petitioners -- there are

changes from day to day -- those death sentences should be vacated.

JUSTICE ENGLAND: Two minor matters -- and I appreciate your answer on that. I want to be clear on one thing. I take it from the premise that it's really irrelevant to your petitions that the information or the materials we received were inadvertently or advertently received. It really doesn't matter, as I understand your argument; is that correct?

MR. FRANKEL: Your Honor, that would not be quite correct. I don't think I would want to present a hypothetical that we might press when the facts on which we proceed are stronger than that. These are advertent requests for information and receipts of information.

JUSTICE ENGLAND: Well, no, I thought earlier in your argument you said the mere presence in the file of materials which were subject to consideration by this Court in its total review function tainted the process. It wouldn't seem to matter one way or the other.

MR. FRANKEL: Your Honor, I must be using a lot of words that I would like to retract. If that's what I said, I didn't mean it.

JUSTICE ENGLAND: So, advertence does make a

difference.

MR. FRANKEL: If somebody could prove that there are things in this -- that all the things that we talk about in this Court's files were never looked at by any Justice, that somehow in reading the whole file --

JUSTICE ENGLAND: No, no, that's what we saw. I am talking about how they got there for the moment. I thought you had said it didn't matter how they got there as long as they were there.

MR. FRANKEL: No, I didn't say that, Your Honor. And if I did, I withdraw it. I said that the motives didn't matter, that we believed the ultimate purposes of the Court as a whole -- the Justices, the Clerk's Office, whoever -- were purposes that could readily be seen to be beneficent. And I said that didn't matter.

JUSTICE ENGLAND: So, it does matter then if all the materials were on an ultimate fact-finding suppose really occurred, all materials were the result of no action of the Justices at all and all of it came, let's say, from an assistant clerk's error in asking for the wrong things -- hypothetical -- are you saying that that inadvertence therefore eliminates the complaint you have?

MR. FRANKEL: Your Honor, I take a minute to embrace that hypothetical because it seems to me to be

a little way from the apparent facts as they emerge. But, I accept it for the sake of argument. If some assistant clerk repeatedly caused contaminating materials to be in the files of this Court and if this Court over a period of months or years, the Justices of this Court reading every file from cover to cover allowed that to continue and imposed death sentences in the course of operating in that fashion, if one can picture that degree of inadvertence in seven distinguished jurists, then we would argue yes, that invalidates the process.

JUSTICE ENGLAND: So, inadvertence doesn't matter. Okay.

MR. FRANKEL: It could.

JUSTICE ENGLAND: I thought that's what you were saying.

MR. FRANKEL: We claim much more than inadvertence.

JUSTICE ENGLAND: I understand.

MR. FRANKEL: Driven to this situation where all accidentally, all beknownst to the Justices, the stuff gets into the files, the Justices read it year-in and year-out, don't fire that assistant clerk, don't raise a question how is this stuff getting into our files, and go ahead and adjudicate in that fashion, just as

any other deleterious ex parte materials appearing in a court record with that kind of irregularity would lead to a determination of invalidity, we would say those death sentences are certainly invalid. Thank you, Your Honors.

CHIEF JUSTICE SUNDBERG: Counsel, Mr. Marshal, by my count Justice England took up eight minutes of your rebuttal. I assume that's what you had reference to when you were referring to Mr. Georgieff. Is that your count, Mr. Marshal? Would you reserve eight minutes then in his rebuttal?

MR. FRANKEL: Your Honor, I certainly appreciate that. I don't think Mr. Georgieff will cause me to get up for any great length of time. Thank you.

MR. GEORGIEFF: Mr. Chief Justice, may it please the Court, as you know our aspect of this comes down to the Motion to Dismiss that we filed for the reasons that we included in it and which I hope to articulate here in the event that it isn't clear from what we did file.

In response to Mr. Justice Overton's question, I heard Judge Frankel say if you got a post-sentence report as opposed to a pre- that you requested, which should have been sent up but was not, depending on the extent to which you looked at it and even though you

did send it back, you might or might not have to reverse in this or that case. Now, you have heard everything about "E" today in their petition. You have heard nothing about the other claims.

We contend and we agree that if what they said was so and if you could equate Gardner to a status which included your function as well as that of the trial courts, we agreed that that question was a valid and proper one. We disagreed on the conclusion that because there conceivably may be a circumstance in which you will find one case to have been affected by something extrinsic of the record, that you have got to wipe it all out.

Well, that didn't happen in Gardner and would you believe it didn't happen in Witherspoon. In Witherspoon, the one that everybody knows about -- and, by the way, a capital case, as was Gardner, and Gardner was a Florida case -- nothing happened like that. And, by the way, you asked the question about Godfrey. I think, Mr. Justice England, you asked about Godfrey. What is Godfrey all about if they are correct in their position saying if we can demonstrate that this is the general posture in which you find it -- which, by the way, they haven't done -- if they can do that, then the whole must fall because we think we may

be able to show that one either could or should not have been done.

Now, we submit that their argument has to fail for that very reason. They tell you that we're necessarily incomplete in what we urge here. Why? I have no notion of why they're incomplete. Your files are available to them. Files of the Department of Corrections are available to them. They represent an aggregation of some 80 legal minds, which perhaps in the area of capital punishment, certainly in Florida, are exceeded only by those on the staff of Jim Smith.

And I am telling you that there is no reason why they couldn't come to you and plead the individual cases. I think Mr. Justice England, you asked the question, "Well, what happens and how do we reach the cases that have long left our jurisdiction by the issuance of a mandate, by this, by any other means you want?" And, indeed, with Spinkelink, by death itself. All right. If they file the individual petitions that we contend are a requisite before anything intelligent can be done about it, you can reach every one of them--every one.

You cannot do it on the first one because there are areas which simply do not get to it because they can't put themselves into the posture of people who are

going to benefit in an aggregation where they can't show the tie. We go back again to Gardner. What does it mean to say that I am going to plead that something may have been done to me because I think I can show that something was done over here? That has nothing necessarily to do with me.

I will give you circumstances not literal, hypothetical. Let's assume for the moment that somebody volunteers some information to you. You come by it honestly, intelligently, any way you want. I am not going to poison anybody's well. I don't know or care what your motives are. I know and care what you do. That's what's measured.

Washington never knows about your motives anymore than we do. The whole point is what have you done? If you did do something, it has got to be evidenced by some activity on your part, by some writing, by some utterance. If you didn't do it, I want to know what has to result as to those cases in which it was not done.

How about in Hargrave? In Hargrave didn't you tell the Bench and the Bar that, you know, you told the world, and I suppose that includes lawyers, Look, what your function is is to review, not to impose the sentence. You don't impose any sentences. You may

reduce them because you find that some of the mitigating were improperly withheld, some of the aggregating were improperly assessed. You may do many, many things, but all you do is determine whether what the trial court did squares with due process as you understand it to be under Florida law and to the extent that is necessary under Federal law.

When that leaves this Court, then the last bastion is in Washington where they determine whether what everybody did, including you as the terminal treatise, whether what you did squares with Federal law or collides with it to a degree necessary for them to write something. If they do, then they strike it down. If they are apprehensive, they remand it as they did in Gardner or, when it came up in Witherspoon, and as they will do again in Godfrey.

The whole point is, these are correcting attitudes. You cannot correct if you strike it down.

They tell you the statute is infirmed because we believe it has come to seem, you know, all of these, just like Merlin with his magic wand, it seems as though. What seems?

I don't believe that they can't find whatever it is they need to plead and prove their case. If they do, you have in front of you all the machinery necessary

by appointing a commissioner, by setting it down for this type of hearing, by any type you want to find out whether anything infirmed occurred.

Indeed, the whole posture of it is that you don't need any information to aggravate a sentence above what it is. They all come to you as death. So, if there were to be any complaint that was intelligent and based on something very real, it ought to come from the people who wind up defending the death sentences, that is to say us. But, you don't hear that complaint from us.

He tells you that as you went along here the reason that you have an infirmity of such magnitude that you have to reverse all the cases is because the ones that were reduced to life imprisonment maybe don't matter, but those other people have a right to say, "Well, now, wait a minute, because you messed up the system, we think that all of it must go because the taint simply cannot be removed."

What he is really telling you is that you didn't make mistakes in all the cases, which puts us back to where we were. If you have an individual complaint in which you can demonstrate this, then very simply you go ahead, make your allegations and if you can prove them in this forum or one appointed by it or delegated,

then very simply you may have an opportunity to prevail. And if you can prove it, perhaps you should. I do not understand how on a tangent somebody should pick up the benefit in a circumstance that conceivably could have happened in some other case.

He tells you ex parte. What is ex parte? If you look at Page 30 of the exhibits they furnished, you will find a notice there about a PSI being requested. And I notice that Mr. Marky's name is carried on the left-hand margin as one of the parties who were told about it and defense counsel on the other.

Now, is that ex parte? And that points up what again I am telling you, that very simply they paint either with too broad a brush or they don't want to use a narrow one or they don't want to paint at all. They want you to do it on the theory that the statute is infirmed. The statute is not infirmed. You have said so. United States Supreme Court has said so and that's beyond peradventure.

If he suggests that what may have occurred over a span of time in this tribunal, either deliberately or otherwise, so infects the proceedings that it ruins them all, I ask you about Gardner, I ask you about Witherspoon and I ask you about Godfrey. They don't all fall. We correct it if it's wrong, but we require

that they allege and prove that it is wrong as to each individual whom they think it may be applied to, not across the board.

JUSTICE ENGLAND: Mr. Georgieff, help me with my recollection. There's a blurring in the argument that I heard -- and I didn't get a chance to ask Mr. Frankel to straighten it out -- between ex parte and record and nonrecord, two different concepts, but they keep getting pushed together.

With regard to record and nonrecord, am I correct-- I have a recollection that in some capital cases that have come to this Court there have been motions by I think public defenders or private counsel to supplement the record with materials which were never in the trial of the court below?

MR. GEORGIEFF: Yes, that has occurred, not too frequent, but it has.

JUSTICE ENGLAND: If my recollection is accurate, further some of those materials related to post-sentence, either conversations or reports or something in the Corrections system. I also believe, by the way, the State -- your office -- has moved to dismiss all those as being improper.

MR. GEORGIEFF: Most of the time unsuccessfully.

JUSTICE ENGLAND: Unsuccessfully?

MR. GEORGIEFF: Yes. Let me explain. I don't want to be --

JUSTICE ENGLAND: No, I am just trying to recall because if the point is valid about record and non-record and that we're obliged not to have things that are outside the file, I'm trying to relate that to the request of some counsel to have things outside the record file for our review. Your recollection is the same as mine?

MR. GEORGIEFF: No, but if you are asking is that an accurate recollection, the answer is yes, it is.

JUSTICE ENGLAND: That's all I am really asking you.

MR. GEORGIEFF: Now, I don't want to be strapped to what it was you may particularly recall because I couldn't give it to you now without doing a little bit of searching, but, yes, that has occurred and really it isn't all that infrequent. Matter of fact, at all levels below capital cases it occurs with alarming frequency.

Now, you know, whether it's done for this or that means, he simply, I would assume by that and you by your inquiry, is saying, well, if it's initiated by counsel, then, one, it can't be ex parte; two, it can't

be anything but it is dehors the record, extrinsic, whatever you want to call it. Now, I don't pretend to know how you would resolve that, but for our purposes --

CHIEF JUSTICE SUNDBERG: Let me ask you -- that's a loose term, "dehors the record." The PSI, to my knowledge, since I have been here, is carried in a special part of the court file. It is never a part of the record below; is it?

MR. GEORGIEFF: It depends on which it is, Judge.

CHIEF JUSTICE SUNDBERG: My recollection of the criminal rule is that it is delivered by Parole and Probation to the trial court for use during sentencing. And that's in all cases.

MR. GEORGIEFF: Yes.

CHIEF JUSTICE SUNDBERG: Delivered back to Parole and Probation and ultimately finds its way here to Tallahassee.

MR. GEORGIEFF: Yes.

CHIEF JUSTICE SUNDBERG: And that doesn't become-- although it was utilized, everybody knows it was utilized by the trial court -- it does not become a part of the record because of the issue of confidentiality as to the entire report.

MR. GEORGIEFF: No, of the proper record, you are

correct, sure.

CHIEF JUSTICE SUNDBERG: All right. And then those then, where they are material, have come over to this and repose in the court file in this Court; correct?

MR. GEORGIEFF: Yes.

CHIEF JUSTICE SUNDBERG: Is that dehors the record?

MR. GEORGIEFF: Not in my view. And certainly -- I don't even care if literally it falls within something that doesn't fit within the accordion file. It isn't that that's contemplated by what it is they're talking about. I guarantee you that that cannot be error. The reason for that is very simply Counsel knows about it because it's requested. Now, there may be -- you know, there may be things in it that he doesn't want in. But, the point is, he does know about it. So, though it may be physically not incorporated in what you and I generally refer to as the record, he does know about it. So, it's not extrinsic, unlike a post-sentence report, which might come inadvertently, might come this way, that way. When everything is done and let's say a court already has the case, so in that regard it's similar and yet it's different, if you understand what I mean.

CHIEF JUSTICE SUNDBERG: Unless that was ascertainable, too, but, go ahead.

MR. GEORGIEFF: Yeah, but there may be a host of situations, any one of which -- now, you could go into hypotheticals all day long. Somebody may say, "Well, what in the name of heaven would anybody on this Court be asking the Department of Corrections for this, that, or the other?" Well, it may be that it's a whole lot simpler to get the identical item from them as opposed to the Clerk of the Circuit Court, as you suggest, the PSI, which is late in arriving sometimes 10, 15 weeks.

Now, I do not care where you got it, if you got anything. It doesn't make any difference. The whole point is when these people are ready and willing and able to stand here and tell you that as to this case, you did this, you did this, and you did this, and that is legally impermissible under any view of due process and you cannot find any reason to gainsay it, then they have a basis on which to complain. They certainly cannot do it under the "E" complaint, which is the only thing they have argued, by the way. And by limiting their argument to that, they have illuminated what we said about the balance of the claim, has to come in individually or it simply can't

make it. And I don't --

JUSTICE ENGLAND: I think they were limited a little bit by the questions to the "E." I expected they intended to get into A through F.

MR. GEORGIEFF: Perhaps so, but let's put it this way. I will advance it affirmatively as our argument, if that is the case; and if it isn't, I submit that very simply, you know, petitions for habeas corpus have been coming here for as long as the Court has been here. None of that is frightening or awesome or anything like that.

I don't like the idea of treating 123 individually any more than you may or they may. But, the whole point is I don't know how you can throw baby out with bathwater by simply saying we think there may -- and, by the way, they base it on what? On newspaper articles and a handful of letters?

Now, I don't know which one of you would recall that cases are won or lost on that as evidence. I do not think so. And I don't think you will either.

Now, with regard to the complaint that's been made on the "E": You can decide that without any prejudice to the remaining people, whoever they may be, whether there are 123, 122 or whatever increment. You can do that on any basis you want without prejudice for

them to come back to you. And if they are able to demonstrate a sufficient quantum of allegations and visible proof that they fall somewhere under either of the other five claims and thereby you can take care of everything that is necessary. And I might add, by the way, you know, if we're wrong, how come Pippin got his case set down to life imprisonment last week, just last week by this Court? Now, he was in the group and that's a fait accompli; the decision is out. It's reduced to life. What? If it was so infected that it encompasses everybody, how did he wind up on the beneficial end? That's a good question that they ought to ask, and I don't know...

Ten days ago you were petitioned by Mr. Lacey Mahon of Jacksonville, and an attorney by the name of Hirsch, to include their cases in this aggregation of 123 with nothing but a blanket motion saying that they, too, were on death row, and they, too, should be permitted to be included in this group for disposition, fair or foul, as to how it goes. You issued your order on the 17th of October denying that.

Now, if we are wrong in our motion, that order denying their motion was wrong, and they should have been included. And I will say that if the position advanced by Judge Frankel today is correct, once again,

their motion should have been granted. If it so infects the whole proceeding that there is no escaping it, then literally you have got to take in everybody, even though you are confronted with what you inquired about, Mr. Justice England. And that is to say, how do we get to them unless we make it a blanket proposition. And, in the writing, when you do write it, if you do, tell them how Godfrey doesn't apply and tell them how Gardner doesn't apply, tell them how Witherspoon doesn't apply and all the others that don't reach down to the bottom level and make it impossible for anything to continue.

I might add, what about the handful of cases that exist in your court where all you had is a notice of appeal and absolutely nothing else? It simply has not matured. Are those, too, infirmed? Are they, for either the reasons advanced here by the Judge or any that you have heard or any that you can think of? Now, I don't know what went on if anything went on. What I do know is if they suspected something did and if it is of the nature or status that they tell you that it has to be, then they know how to plead and they know how to prove. And our position is very simply at least and until they do, that there is no way that they can prevail with the kind of claim that they have advanced

here under "E," and they certainly can't under the others because they haven't argued them.

Now, you are not disposing of any individual claims here. You are simply disposing of the general claim that they belong under some sort of an umbrella, magic or otherwise, which will give every one of them the kind of relief that they say they want.

Now, if that's true, then very simply it leaves intact all the rights that the others have to come in and plead whenever and however and to what degree they want to show that their claims have indeed been violated. You have handled scores of thousands of them over the years and you certainly know how to do it now. Thank you.

CHIEF JUSTICE SUNDBERG: Mr. Frankel.

MR. FRANKEL: Your Honor, Mr. Georgieff has been so becoming that I will try to use only seven of my eight minutes.

CHIEF JUSTICE SUNDBERG: The Court thanks you.

MR. FRANKEL: I want to say that as to the number of Petitioners, this, of course, is a question mooted in the papers. Our broad contention is that there is an invalid system under an invalid statute for the imposition of death sentences, and we could, of course, present that broad position starting with Mr. Brown by

these Petitioners one at a time. I'm advised that this Court, like many other courts in America, is busy. And believing that the broad claim is a responsible and principled one that this Court would want to reach on the merits, we thought it appropriate in the service of the Court and of the Petitioners to bring them on all at once. And we may be right in our claim and we may be wrong, but it is presented in earnest and in some detail as amplified in this oral argument. And we do urge it upon the Court. It's ripe for decision and we trust that the Court will decide it.

There are cases in which a capital sentence goes to the Supreme Court of the United States and only that particular case is reversed. There are cases, and their names are familiar to all of us, where a particular petitioner goes to the Supreme Court of the United States and the result of his effort is to invalidate across the board the statute under which his sentence was imposed.

And we say to Your Honors that we hope that the law in Florida can be made satisfactorily in Florida; and what the Supreme Court of the United States may or may not do, ought not to be of particular concern at this juncture. But, we do say, we are compelled to in

representing our clients, that we present this as a Proffitt case, which was won by the prosecution in Florida; as a Furman case, which was lost by Georgia; as a case that does bring into question the whole statutory scheme. And it's not possible, we think, to avoid answering that question by talking about all the horrendous consequences of one answer or another. If we're right, of course, the motions of 10 days ago could conveniently have been granted. But, it doesn't make any difference because if we're right and if we win, those two movants will get the relief to which we claim they are entitled anyhow.

It doesn't advance this inquiry to wonder why this Court may or may not have granted some motion before it heard a full presentation of the issue that we now place before you.

Now, on the question of what's ex parte and what's in the record, I just want to add this, that first I am informed, and I do not know for sure, but a number of these spectators are very interested legal people -- I am informed that characteristically when they have moved to supplement the record, including motions to supplement with psychiatric information on their capital appeals, the motions have been denied. I don't know whether that's uniformly

true or not. I don't think it matters.

What I do know is that it is a whole world different to have a motion on the record, copy to Counsel, saying, let's make this piece of paper a part of the record and fight about it from the situation where a piece of paper finds its way into the record and is considered and one party doesn't know anything about it. One is ex parte. That's what the canons and the Constitution denies. The other is not ex parte. Whether the Court wants to add to its record or not is a familiar kind of question that has a familiar kind of answer.

Now, the way oral argument --

JUSTICE ENGLAND: Mr. Frankel?

MR. FRANKEL: Yes, sir.

JUSTICE ENGLAND: That leads me to ask your request for the appointment of a commissioner to find facts, isn't that really irrelevant? If you have got enough in Exhibit B to indicate that in any file there was a request from the Court for a document which found its way in, haven't you made the point that you are seeking and it is irrelevant how it got there, what the motives were, what we did with it, how long it was there? I am trying to really understand what you are saying is important and what isn't.

MR. FRANKEL: I'm trying with mixed success to help you understand the scope of our position, Your Honor. We claim, we allege a pattern and practice. We allege responsibly as Counsel that the materials in this Appendix, however thick, are necessarily only illustrative. We tell you because you know anyhow that among the inquiries we would have to make in order to state the full scope of this pattern and practice are inquiries we have never made of Your Honors, among other things.

JUSTICE ENGLAND: What difference? I thought your point is --

MR. FRANKEL: Well, it makes a big difference.

JUSTICE ENGLAND: If the documents are there you have already documented what you have in Appendix B --

MR. FRANKEL: Your Honor, if you accept our allegations which are undenied that there is a broad pattern and practice that this happens a lot, we accept that basis of adjudication. If you agree and as a pleading matter -- and we don't think an important case like this necessarily goes off on pleadings -- but, if Mr. Georgieff agrees with us that this is a pervasive pattern and practice in this Court to take in these kind of materials and inferentially at least to consider them, then we'd submit the case to you on that

basis.

JUSTICE ENGLAND: So, your request for a commissioner is only to find out if it's a pervasive practice?

MR. FRANKEL: Your Honor, it's only anticipatory on the assumption that if our allegations in their full breadth are denied and if issues of fact arise, factual questions would be presented to be explored. We claim a broad pattern and practice. If it's admitted, well, then the claim is presented, it's ripe and the facts we allege present issues of law.

If it's denied or disputed, evidentiary questions arise.

JUSTICE ENGLAND: So, then it is not your position that if it happened in one case, that's the end of the capital sentencing process? It has to be a pervasive practice.

MR. FRANKEL: Yes, Your Honor, that's our position. Well, it has to have been a frequent practice. And if the Court finds it material to discriminate among words like "frequent, pervasive, broad, general," for purposes of this legal question, and if those refinements might relate to concrete facts, we are prepared to assist the Court in finding those facts the most expeditious way possible and that's what

the Master's about.

JUSTICE ENGLAND: But if the critical word is "isolated," then you would have no complaint?

MR. FRANKEL: Well, we would have a complaint and it depends on how isolated.

JUSTICE ENGLAND: Now, you're fudging the words a little bit.

MR. FRANKEL: Your Honor, I am dealing with somewhat hypothetical facts.

JUSTICE ENGLAND: I'm merely trying to find out what the basis of your argument is because I thought that your attack and your argument was focused on the point that if it happened once, it proves the process is wrong and our statute will not operate and must be invalidated.

MR. FRANKEL: Your Honor, I would not permit myself on behalf of these Petitioners to be reduced to that position. If it happened once, I don't think I would be standing here arguing that it invalidates the statute. And we allege, and nobody denies yet, a great deal more than once and that's the position on which we submit the case to Your Honors now.

JUSTICE ENGLAND: But it wasn't really the factual difference that is the focus point, Mr. Frankel, I am really trying to grasp, because it is the

proportionality concept that you say is required of us and that would be distorted by one as prejudicially potentially as by 50.

MR. FRANKEL: No, Your Honor, it wouldn't any more than -- what shall I say -- refusing to serve a Chinese one day because some waitress had a headache would show racial discrimination. We're talking about a pattern and practice. Now, how many instances make a pattern and practice could be a subject of discussion. And, if it is to be discussed, we'll discuss it.

I want to say, Your Honors, if I may that the oral argument is for the service of the Court and it's been directed and I appreciate that on behalf of the clients to a great extent by questions from the Court. I think it must be said in protection of the clients' interests, however, that we do not abandon any of the positions urged in this petition. It's not just "E." It's the whole petition.

CHIEF JUSTICE SUNDBERG: That's understood, Mr. Frankel.

MR. FRANKEL: Thank you, Your Honor.

CHIEF JUSTICE SUNDBERG: Thank you very much. That concludes the Court's docket for today.

(Whereupon, the proceedings were concluded.)

* * *

CERTIFICATE OF REPORTER

STATE OF FLORIDA)
:
COUNTY OF LEON)

I, CATHERINE HARDEN, Official Court Reporter and Notary Public in and for the State of Florida at Large:

DO HEREBY CERTIFY that the foregoing hearing was held before me at the time and place therein designated; that my shorthand notes were thereafter reduced to typewring under my supervision; and the foregoing pages numbered 1 through 64 are a true and correct record of the aforesaid proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

WITNESS MY HAND AND SEAL this, the 10th day of November, A. D., 1980, IN THE CITY OF TALLAHASSEE, COUNTY OF LEON, STATE OF FLORIDA.

Catherine Harden

CATHERINE HARDEN, CP, CSR, RPR
Official Court Reporter
Notary Public in and for the
State of Florida at Large.

My Commission expires: April 25, 1984.

* * *

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of the Supreme Court of the United States and that I served a copy of the annexed petition for writ of certiorari with all appendices on respondent by depositing a copy in the United States mail, first class mail, postage prepaid, addressed as follows:

Hon. Jim Smith
Attorney General
The Capitol
Tallahassee, Florida 32304

All parties required to be served have been served. Done this 2d day of April, 1981.

Marvin E. Frankel

Marvin E. Frankel
300 Park Avenue
New York, New York 10022

Attorney of Record for Petitioners

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

80-6434

Joseph Green Brown, et al.,

Petitioners,

-vs-

LOUIE L. WAINWRIGHT,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JIM SMITH
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Joseph Green Brown, et al.,

Petitioners,

-vs-

LOUIE L. WAINWRIGHT,

Respondent.

PRELIMINARY STATEMENT

Respondent accepts that portion of the Petition for Writ of Certiorari setting forth the Citation To Opinion Below, Jurisdiction, Constitutional and Statutory Provisions Involved found on pages 1 through 4 of the Petition.

QUESTION PRESENTED

The question before this Court is twofold: first, whether the alleged actions of the Florida Supreme Court violate the Fourteenth Amendment right of due process to fair capital appellate review in violation of Gardner v. Florida, 430 U.S. 349, (1977); and, second, concomitant thereto whether Petitioners' right to a effective assistance of counsel, right of confrontation, right to proportionality in capital sentencing

pursuant to Proffitt v. Florida, 428 U.S. 242 (1976), and right against self-incrimination have been abridged.

The decision by the Florida Supreme Court in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981) resolved both issues adversely to Petitioners.

STATEMENT OF THE CASE

Respondent accepts those portions of the Petitioners' Statement of the Case which accurately reflect the judicial sojourn the instant cause has taken. Respondent cannot accept those portions of the statement of the Case which are argumentive, not supported by an appropriate reference to the record below, or have never been adequately developed for review.

Those facts set forth in Brown v. Wainwright are the operative facts applicable for consideration herein:

> Alleging common issues of law and fact, Brown has joined with one hundred and twenty two other persons who seek relief from allegedly unconstitutional sentences of death. The dominant theme in the multiple request for relief is the alleged impropriety of this Court's having considered, in the course of reviewing sentences of death, documents which were not made available to the defendants' counsel. For most of the petitioners, the alleged impropriety was the court's consideration of undisclosed documents not related to the proceedings in which their sentences were imposed and upheld, but seen in the course of reviewing death sentences approved or considered for other criminal defendants.
>
> [392 So.2d at 1328-1329]

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The question before the Supreme Court of Florida was whether the alleged actions of the Florida Supreme Court in "the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and was not a part of the trial record or a record on appeal", to-wit: pre-sentence investigation reports, psychiatric evaluations, or contact notes made in the corrections system after conviction and psychological screening reports made after conviction by corrections personnel, and other documents; resulted in a "rash of constitutional violations ranging from a denial of due process in individual cases where information was received on one hand to a pervasive violation of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) in all cases reviewed and affirmed by the court, on the other hand. In short, Petitioners contend that our alleged misconduct requires our invalidation of all death sentences imposed or approved in Florida and by necessary implication, that we declare Florida's death penalty statute invalid and unconstitutional in its operation." [392 So.2d at 1331]

In resolving these mammoth yet unspecified constitutional infirmities, the Florida Supreme Court ruled: (1) that a class had not been properly joined, but "to avoid absurd technicalities, however, we decline to treat each petitioner as it were separately filed and enter a separate order or opinion on each. Rather, our disposition of Brown's Petition effectively disposes of all claims for relief of those petitioners who have joined with Brown. In the future, attempts to create a class action habeas corpus proceeding in situations such as this will be rejected summarily.. . ." [392 So.2d at 1330] and, (2) that the court's role after a death sentence had been imposed is

to "review" the imposition of death to determine first whether "procedural rectitude has been applied pursuant to § 921.141, Fla.Stat., and case authority", and second to ensure "relative proportionality among death sentences which he been approved statewide." [392 So.2d at 1331]. The court went on to say:

> Neither of our sentence review functions, it will be noted, involves weighing or re-evaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation is not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.
>
> [392 So.2d 1331]

The court concluded that Gardner v. Florida, was not applicable to appellate review proceedings citing to Ex Parte Farley, 570 S.W.2d 617 (KY 1978) wherein a similar result obtained.

REASONS FOR NOT GRANTING THE WRIT

All one hundred and twenty three Petitioners herein allege that their consititutional rights have been violated. Generally, they assert that the Supreme Court of Florida violated their right to due process to a fair appellate review because the court presumably in an unidentified number of cases requested and received information beyond the trial record, thus, violating this Court's decision in Gardner v. Florida, 430 U.S. 349 (1977). They further contend, based on this major assertion, that they were denied the right to effective assistance of counsel, denied the right to confrontation, denied their Eighth Amendment right to proportionality in capital sentencing in violation of Proffitt v. Florida, 428 U.S. 242 (1976) and denied their right against self-incrimination and the right of assistance of counsel in exercising said rights.

The Florida Supreme Court in Brown v. Wainwright, supra, found their claims wanting. The court ruled that Petitioners' Eighth Amendment right to proportionality in the imposition of capital sentences had not been violated and noted that the assortment of constitutional violations tangential thereto was not presented in a compelling fashion.

A cursory review of the pleadings filed sub judice and the Petition for Writ of Habeas Corpus filed in the Florida Supreme Court reveals that not one of the one hundred and twenty three Petitioners has asserted facts peculiar to his case that would support the claims of constitutional infirmities argued. The right to due process, effective assistance of counsel, the right to confrontation, and the right to protect oneself against

self-incrimination and to have the assistance of counsel in determining same are individual claims which must be individually asserted. The general allegation, that one hundred and twenty three individuals' constitutional rights have been violated without specifics does not satisfactorially raise a cognizable claim to be reviewed by this Court. Albeit it appears there is a "common" constitutional violation alleged, to-wit: that proportionality in the imposition of capital sentences has been marred, there are members of the group who, within the perimeters of their own pleadings, fall outside the complained of period. See United States District Judge Gonzalez' Order in Sullivan v. Wainwright, case number 79-2721-Civ-JAG, Order rendered June 4, 1981. (Appendix I).

Respondent in its Motion to Dismiss the Petition for Writ of Habeas Corpus in the Florida Surpeme Court argued two grounds: (1) that proportionality in sentencing had not been disrupted and there was no violation of Gardner v. Florida, supra, and (2) that there were no facts and circumstances of each Petitioner developed to provide the Florida Supreme Court an opportunity to review the merits of individual contentions.

The court in Brown v. Wainwright, supra, concluded:

> It is evident, once our dual roles in the capital punishment scheme are fully appreciated, that non-record information we may have seen, even though never presented to or considered by the judge, the jury, or counsel plays no role in capital sentence "review". That fact is obviously appreciated by the United States Supreme Court for it very carefully differentiated the sentence "review" process of appellate courts from the sentence "imposed" function of the trial judges in Proffitt and in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

[392 So.2d at 1332, 1333]

The gravamen of Petitioners' pleading is that the Florida Supreme Court violated Gardner v. Florida, supra, in that they received information which was "de hors" the record proper. They do not assert generally or specifically that the court used said information, nor can they point to any one of one hundred and twenty three cases where the rendition reflects usage or where actual prejudice occurred. (Respondent is not unmindful of Petitioners' general contentions of several constitutional infirmities, to-wit: violations of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution).

As noted by this Court in Rakas v. Illinois, 439 U.S. 128, 139 (1978):

> It should be emphasized that nothing we say here casts the least doubt upon cases which recognize that, as a general proposition, the issue of standing involves two inquiries: first, whether the proponent of the particular legal right has alleged "injury in fact", second, whether the proponent is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties.

This court in footnote eight further noted:

> This approach is consenant with that which the court already has taken with respect to the Fifth endment privilege against self-incrimination which also is a purely personal right.
>
> [Id. at 140]

See also, United States v. White, 322 U.S. 694 (1944); Data Processing Service v. Camp, 397 U.S. 150 (1970); Fisher v. United States, 426 U.S. 319 (1976); and Rawlings v. Kentucky, ____ U.S. ____, 65 L.Ed.2d 633 (1980).

A cursory inspection of four of the group of one hundred and twenty three demonstrates the lack of any "injury in fact". Petitioner Robert A. Sullivan attempted to file amended pleadings to his federal habeas corpus action in Sullivan v. Wainwright, case number 79-2721-Civ-JAG, United States District

Court, Southern District of Florida alleging:

> In Brown, the class alleged that: "This court, (Supreme Court of Florida) since at least as early as 1975, has engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal. Brief of Petitioners-2"
>
> Respondents correctly point out that petitioner's capital sentence was reviewed by the Supreme Court of Florida in 1974, prior to the time period covered by Brown v. Wainwright. See Sullivan v. State 303 So.2d 632 (Fla. 1974), cert.denied 428 U.S. 911 (1976). It is accordingly,
>
> Ordered and adjudged that Petitioner's Motion for Leave to file ended Pleadings be and same is denied.
>
> [Order dated June 4, 1981, Sullivan v. Wainwright, case no. 79-2721-Civ-JAG, United States District Court, Southern District of Florida]

While Sullivan may assert that he should be entitled to relief if Florida Supreme Court's actions violated Gardner v. Florida, supra, absent said finding by this Court, Sullivan cannot prevail. What harm has he demonstrated? How has his constitutional right to confrontation been violated? Sullivan's appellate review occurred prior to the commencement of the alleged illegal practices. In Godfrey v. Georgia, 64 L.Ed.2d 398 (1980) though this Court reversed Godfrey's death sentence and remanded the case for further disposition, the Georgia death penalty statute and all Georgia death sentences were not struck down, but rather, only those death sentences challenging the applicability of the phrase "outrageously or wantingly vile, horrible, or inhuman in that they involve . . . depravity of mind . . ." were remanded to the State Court for further disposition for the reconsideration of each particular case. See also Presnell v. Georgia, 439 U.S. 14 (1978).

Petitioner Johnny Paul Witt, similarly took his claim

to federal court in Witt v. Wainwright, case number 80-545-Civ-T-GC, United States District Court, Middle District of Florida, Tampa Division, and found an unsympathetic ear before United States District Judge Carr. In an order dated May 14, 1981, (Appendix II) the District Court ordered that Respondent's Motion to Dismiss ground 12(i) of the amended petition be granted. Following oral argument on the motion held April 3, 1981, Judge Carr concluded Witt's claims were meritless. The court noted:

> It is manifest from the Florida death penalty statute, § 921.141, that the trial judge, following receipt of the jury's sentencing recommendation, weighs the evidence of aggravating and mitigating circumstances and imposes sentence. The Supreme Court of Florida's sole function under the statute is review of that sentence for procedural propriety and proportionality among other Florida death sentence cases. Brown, supra, at 1331. The weighing or evaluating of aggravating and mitigating circumstances is not a part of the Florida Supreme Court's function, and non-record information therefore plays no part in its review. Id. at 1332.
>
> Because the Florida Supreme Court function in capital cases is narrowly confined to reviewing sentences for procedural regularity and proportionality, Gardner v. Florida, 430 U.S. 349 (1977) is inopposite. Gardner held that it is a denial of due process for the trial court to impose a sentence of death where it is based, at least in part, on information which the defendant has no opportunity to deny or explain. 430 U.S. at 362. Since under the Florida death penalty statute, it is the trial court and not the Supreme Court of Florida that imposes sentences in capital cases, the fact that the Florida Supreme Court has ailable non-record information in the performance of its review function does not rise to the level of a Gardner violation. See Ex Parte Farley, 570 S.W.2d 617 (Ky. 1978) . . .

[Order dated May 14, 1981, pages 2-3]

Petitioner Witt has yet to present so much as one fact which would support his contention that his constitutional rights had been violated. What injury has Witt suffered?

Petitioner Joseph Green Brown, on the other hand, the lead-off name in this pleading, may or may not have a reviewable claim. On January 31, 1980, the Florida Supreme Court rendered Brown v. State, 381 So.2d 690 (Fla. 1980). Prior to that rendition, the Florida Supreme Court on May 11, 1977, issued an order with notice to defense counsel, the Honorable J. Michael Shea, for "the Parole and Probation Commission transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this cause." On May 11, 1977, the Chief Deputy Clerk of the Florida Supreme Court requested of Mr. Stancil that, " a copy of the latest psychiatric evaluation made on the above-named inmate who is on death row" be sent. On May 16, 1977, Mr. Sid J. White, Clerk of the Florida Supreme Court, received a letter from Harry T. Dodd, Parole Agent Supervisor with the Florida Parole and Probation Commission, indicating that the Florida Parole and Probation Commission's records did not reflect that a pre-sentence investigation was conducted in the first degree murder case, but rather, there was only a pre-sentence investigation done for a charge of robbery against Brown. (Said letters are part of Respondent's Appendix III)

While it appears that the Florida Supreme Court sought further data in Petitioner Brown's case, there is nothing in the instant pleadings to reflect that even if the court obtained this information, any of it was utilized. Assuming for the moment that Gardner v. Florida, is spplicable to appellate reviewing courts, Respondent would tender that in Petitioner Brown's case there has been no allegation that it was used and as observed in Gardner v. Florida, supra, where the trial court had information

not available to Gardner,

> In those cases in which the accuracy of the report is contested, the trial court can avoid delay be disregarding the disputed material.

[51 L.Ed.2d at 403.] (Emphasis added)

Indeed, this Court in denying certiorari in Alford v. State, 355 So.2d 108 (Fla. 1977) cert.denied 436 U.S. 935, refused to review a case where the trial court had information from a pre-sentence investigation report that was not made available to defendant, but was not used. The Florida Supreme Court in addressing said issue held:

> In response to the motion to vacate, the State says that, assuming the judge was "made aware" of certain facts that doesn't mean that he "considered" those facts in imposing sentence. The State draws a distinction between being "aware" of certain facts and "considering" them. We agree.
>
> The United States Supreme Court in Gardner recognized the ability of the sentencing judge to disregard material in imposing sentence. . .

[355 So.2d 109]

See also, United States v. Pinkney, 543 F.2d 908 (C.A.D.C. 1976).

Even assuming at this point that Petitioner Brown's constitutional rights might have been violated, the proportionality in the reviewing of capital sentences has not been so irretrievably harmed that the whole system falls. See Godfrey v. Georgia, supra, where the very integrity of the imposition of a death sentence was challenged and still, the Georgia death penalty statute was not held unconstitutional.

Finally, a review of Petitioner Bernard Bolander's circumstances is interesting in light of the constitutional infirmities he has alleged. At the time Petitioner Bolander and his one hundred and twenty two peers filed their Petition for Writ of Habeas Corpus in the Florida Supreme Court, the only pleading filed in Mr. Bolander's case was a notice of appeal

which had been filed on or about May 29, 1980. Certainly, Mr. Bolander and individuals similarly circumstanced, cannot prove that they were denied assistance of counsel, denied the right to confrontation, denied their right to be protected against self-incrimination, or for that matter, denied proportionalty in appellate review. Mr. Bolander had not even commenced, except for the filing of a notice of appeal, his appellate review.

Respondent would urge that the four petitioners selected sub judice are circumstanced no better or no worse than any of the remaining petitioners. Indeed, each and every one has particlar circumstances which viewed on their particular facts would run the gamut from no constitutional violations to possibly all the constitutional violations asserted. That is the point. What relief can be given any or all of the one hundred and twenty three Petitioners?

The Florida Supreme Court did not recognize these petitioners as a class:

> The joinder here is manifestly designed, at best, to curtail all executions in Florida on legal grounds not yet adjudicated at least, to suspend the imposition of any lawful sentence until new legal issues are resolved. The latter objective of course, has already been achieved. To allow a joinder under these circumstances in future cases would distort habeas corpus beyond recognition and create a pernicious precedent in capital cases. We decline to approve this precedent. Tbere is no justification for joinder in situtations such as this.
>
> To avoid absurd technicalities, we decline to treat each petition as if it were separately filed and enter a separate order or opinion on each. Rather, our disposition of Brown's petition effectively disposes of all claims for relief of those petitioners who have joined with Brown. In the future, attempts to create a class action habeas corpus proceeding in situations such as this will be rejected summarily.
>
> [392 So.2d 1330]

Similarly, Respondent would urge that Petitioners have failed to demonstrate identical or closely related questions which can be resolved by this Court in its granting of further review. The relief the individual petitioners are entitled to is as varied as their number. Respondent would respectfully urge this Court not grant the writ.

The Florida Supreme Court in Brown v. Wainwright, supra, clearly and specifically delineated their function (as they perceived it), pursuant to § 941.121, Fla.Stat. In reviewing the appropriateness of Florida's capital punishment statute, this Court in Proffitt v. Florida, 428 U.S. 242 (1976) cogently dissected the responsibility of this trifurcated system. In Brown v. Wainwright, supra, the Supreme Court held:

> This court's role after a death sentence has been imposed is "review". A process qualitively different from sentence imposition. It consists of two discreet functions. First, we determine if the jury and judge acted with procedural rectitude in applying § 921.141, and our case law. . .
>
> The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and jury have acted with procedural regularity, we compare the case under review with all past capital cases to determine whether or not the punishment is too great. Proffitt v. Florida, (cite omitted) . . .
>
> Neither of our sentence review functions, it will be noted, involves weighing or re-evaluating the evidence adduced to establish aggravating or mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating or mitigating circumstances are so supportive, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence

must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation . . .

[392 So.2d 1331] (Emphasis added)

The court went on to say:

> The record of each proceeding and precedent necessarily framed our determination and sentence review. Our opinions, of course, then expound our analysis. Factors or information outside the record play no part in our sentence review role. Indeed, our role is neither more nor less, but precisely the same as that employed by the United States Supreme Court in its review of capital punishment cases illustrative of this court's exercise of the review function in Godfrey v. Georgia, U.S. , 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) . . . .
>
> . . . Since we do not "impose" sentence in capital cases, Gardner represents no impediment to the advertent or inadvertent receipt of non-record information . . .

[392 So.2d at 1332] (Emphasis added)

In Ex Parte Farley, 577 S.W.2d 617 (Ky. 1978) relied on by the Florida Supreme Court in Brown v. Wainwright, the court therein held:

> We do not find it possible to believe that in Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the Supreme Court of the United States meant to lay down a principle so pervasive as to require an appellate court to lay for inspection by the appellant, even in a capital case, all the information in its hands from which it may seek perspective and guidance in reviewing the propriety of his sentence. We therefore hold that Gardner does not apply.

[577 S.W.2d at 627]

Respondent would urge that this Court's pronouncement in Gardner v. Florida, supra, was limited to the trial court the "imposer" of the sentence. Petitioners' reliance therefore, on Gardner v. Florida, is totally inapplicable to the circumstances at bar.

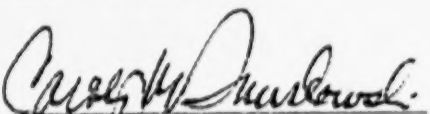
The proportionality of review in capital cases has not been sullied by any practice of the Florida Supreme Court. Only when and if the state or federal courts have had an opportunity to review specific facts in individualize' cases (where each Petitioner has been made to plead and meet his burden) can this Court or any court reasonably review the unsupported allegations made by all these Petitioners.

CONCLUSION

THEREFORE, Respondent would urge, based on the foregoing, that this Court should not grant further review to Petitioners.

Respectfully submitted:

JIM SMITH
ATTORNEY GENERAL

By: 
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IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH GREEN BROWN ET AL VS. LOUIE WAINWRIGHT

Case No. 80-6434

A P P E N D I C E S

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 79-2721-CIV-JAG

ROBERT A. SULLIVAN,
Petitioner,

vs.

LOUIE L. WAINWRIGHT, etc., et al.,
Respondents.

_____/

ORDER

6-8-81

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ATTORNEY GENERALS OFFICE

THIS CAUSE is before the Court for review upon Petitioner's Motion for Leave to file Amended Pleading pursuant to Rule 15(a) of the Federal Rules of Civil Procedure.

Petitioner seeks to amend his Petition for Writ of Habeas Corpus to include the allegation contained in the class action petition of Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). In Brown, the class alleged that

> [t]his Court (Supreme Court of Florida), since at least as early as 1975, has engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal. Brief for Petitioners at 2.

Respondents correctly point out that Petitioner's capital sentence was reviewed by the Supreme Court of Florida in 1974, prior to the time period covered by Brown v. Wainwright. See Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied, 428 U.S. 911 (1976).

It is accordingly,

ORDERED AND ADJUDGED that Petitioner's Motion for Leave to file Amended Pleading be and the same is hereby DENIED.

DONE AND ORDERED in chambers at Fort Lauderdale, Florida this 4th day of June, 1981.

UNITED STATES DISTRICT JUDGE

cc: all counsel

APPENDIX I

MAY 15 1981

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOHNNY PAUL WITT,

Petitioner,

vs. Case No. 80-545-Civ-T-GC

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,
and JIM SMITH, Attorney General,
State of Florida,

Respondent.

_____/

MEMORANDUM OPINION AND ORDER

Before the Court for consideration is the Respondent's Motion to Dismiss ground 12I of the amended petition for writ of habeas corpus. Oral argument regarding the motion was heard by the Court on April 3, 1981.

I. BACKGROUND

In ground 12I of his amended petition, Petitioner argues that in performing its statutory review function of death sentences, the Florida Supreme Court has requested and received, since at least 1975, certain information pertaining to capital appellants which was presented neither at trial nor on appeal and which is not part of the trial or appellate records.[1] A host of constitutional violations under the Fifth, Sixth, Eighth and Fourteenth Amendments are claimed. Because of the unavailability of nonrecord information received pursuant to this practice, Petitioner states that he is unable to determine if the Supreme

1/ According to the amended petition, the information includes (but is not limited to) presentence investigation reports of the offenses under review or of earlier convictions; psychiatric evaluations or conduct notes; psychological screening reports; recitations of capital appellants' refusals to submit to psychiatric examinations; post-sentence investigation reports; and state prison classification and admissions summaries.

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Court of Florida reviewed such information in his case, but that in any event, even if no such information was requested or received in his case, the Supreme Court's practice of receiving such information regarding other capital appellants violated his Eighth Amendment right to proportionality in capital sentencing.

Petitioner previously asserted this identical claim along with 122 other death row inmates in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). In that case, the Supreme Court of Florida found the claims untenable and denied all relief. Id. at 1333.

II. ANALYSIS

For purposes of the Respondent's motion, the Court has, as it must, accepted all allegations of ground 12I as true. Hospital Building Co. v. Trustee of the Rex Hospital, 425 U.S. 738, 740 (1976); Cruz v. Beto, 405 U.S. 319, 322 (1972). Nevertheless, because this Court agrees with the approach of the Florida Supreme Court in Brown, ground 12I is rejected as meritless.

It is manifest from the Florida death penalty statute, Fla. Stat. §921.141, that the trial judge, following receipt of the jury's sentencing recommendation, weighs the evidence of aggravating and mitigating circumstances and imposes sentence. The Supreme Court of Florida's sole function under the statute is review of that sentence for procedural propriety and proportionality among other Florida death sentence cases. Brown, supra at 1331. The weighing or evaluating of aggravating and mitigating circumstances is not a part of the Florida Supreme Court's function, and nonrecord information therefore plays no part in its review. Id. at 1332.

Because the Florida Supreme Court's function in capital cases is narrowly confined to reviewing sentences for procedural regularity and proportionality, Gardner v. Florida, 430 U.S. 349 (1977), is inapposite. Gardner held that it is a denial of due

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process for the trial court to impose a sentence of death where it is based, at least in part, on information which the defendant has no opportunity to deny or explain. 430 U.S. at 362. Since under the Florida death penalty statute, it is the trial court and not the Supreme Court of Florida that imposes sentences in capital cases, the fact that the Florida Supreme Court has available nonrecord information in the performance of its review function does not rise to the level of a Gardner violation. See Ex Parte Farley, 570 S.W.2d 617 (Ky. 1978). In light of the above, and in consideration of the fact that the justices of the Florida Supreme Court are frequently cognizant of nonrecord information that they routinely disregard in the performance of their sentence review function, Brown, supra at 1333, the Petitioner has failed to set forth infirmities of constitutional dimension. Therefore, Respondent's Motion to Dismiss ground 12I of the amended petition for writ of habeas corpus is GRANTED.

DONE AND ORDERED in Chambers in Tampa, Florida, this 14th day of May, 1981.

George L. Cox

UNITED STATES DISTRICT JUDGE

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Supreme Court of Florida

Tallahassee 32301

SID J. WHITE
CLERK
BERNICE L. SAUNDERS
CHIEF DEPUTY CLERK

TELEPHONE:
904-488-0235

May 11, 1977

Mr. Ed Stancil, Director
Department of Offender Rehabilitation
1311 Winewood Blvd.
Tallahassee, Florida 32301

#043546

RE: Joseph Green Brown v. State of Florida
Case No. 46,925

Dear Mr. Stancil:

This is to request a copy of the latest psychiatric evaluation made on the above named inmate who is on death row.

Most cordially,

Bernice L. Saunders

Bernice L. Saunders
Chief Deputy Clerk, Supreme Court

BLS/jdw

sent reports 5-13-77
lk.

May 16, 1977

Mr. Sid J. White, Clerk
Supreme Court of Florida
Tallahassee, Florida

Re: Joseph Green Brown
COI 172407
FPC 042546

Pursuant to the Court's Order of May 11, 1977, in case #46-925, the Commission has conducted a search of its records to determine if a pre-sentence investigation was conducted.

The Commission's records do not reflect that a pre-sentence investigation was conducted in Hillsborough County Circuit Court, case #73-2130-C. The Commission did conduct a pre-sentence investigation in Hillsborough County Circuit Court, case #73-1333-C, which charged Robbery and was not related to First Degree Murder.

If this Commission can be of further assistance to the Court, please advise.

Sincerely,

Harry T. Dodd
Parole Agent Supervisor

HTD/ca

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